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United States

Circuit Court of Appeals

For the Ninth Circuit.

JAMES A. ACKROYD, DWIGHT S. BRIGHAM,
MORRIS F. LaCROIX, EARLE L. CARTER,
J. EDWARD STEVENS, and FRANK E.
NELSON,

Appellants,

vs.

WINSTON BROTHERS COMPANY,
a corporation,

Appellee,

and

BRADY IRRIGATION COMPANY,
a corporation,

Appellant,

vs.

WINSTON BROTHERS COMPANY,
a corporation,

Appellee.

Transcript of Record

Upon Appeals from the District Court of the
United States for the District of Montana.

FILED

SEP 2 - 1933

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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*Page numbering appearing at the foot of page of original certified
Transcript of Record.

In the District Court of the United States in and for the District of Montana—Great Falls Division.

In Equity—No. 3053.

JAMES A. ACKROYD, DWIGHT S. BRIGHAM,
MORRIS F. LaCROIX, EARLE L. CARTER,
J. EDWARD STEVENS, and FRANK E.
NELSON,

Interveners,

vs.

BRADY IRRIGATION COMPANY,
a corporation,

Plaintiff,

and

WINSTON BROTHERS COMPANY, a corporation,
TETON CO-OPERATIVE RESER-
VOIR COMPANY, a corporation, and BY-
NUM IRRIGATION DISTRICT, a public
corporation,

Defendants,

and

C. K. MALONE,

Intervener,

Respondents.

Be It Remembered, that on July 21, 1937, a Complaint and Petition for Declaratory Judgment was duly filed herein, being in the words and figures following, to-wit: [2]

[Title of District Court.]

BRADY IRRIGATION COMPANY,
a corporation,

Plaintiff,

vs.

WINSTON BROS. COMPANY, a corporation;
TETON CO-OPERATIVE RESERVOIR
COMPANY, a corporation; and BYNUM
IRRIGATION DISTRICT, a public corpora-
tion,

Defendants.

COMPLAINT AND PETITION FOR
DECLARATORY JUDGMENT.

The Plaintiff, for its cause of action against the
above named defendants, complains and alleges:

1.

That during all the times herein mentioned, the
defendant Winston Bros. Company was and now is
a corporation organized and existing under and by
virtue of the laws of the State of Minnesota, and is
a citizen and resident of the State of Minnesota.

2.

This is a suit in equity of a civil nature and is a
case of actual controversy. The matter in contro-
versy exclusive of interest and costs exceeds the
sum of Three thousand dollars (\$3000.00).

3.

That heretofore the above named plaintiff did, in writing, request and demand that said defendants, Teton Cooperative Reser- [3] voir Company, a corporation, and Bynum Irrigation District, a public corporation, and each of them, join the plaintiff as parties plaintiff in this action, but each of said defendants have heretofore refused and still refuse to join the plaintiff herein as a party or parties plaintiff in this action for the purpose of litigating the controversy as set forth herein.

4.

That during all the times herein mentioned, the above named defendant Bynum Irrigation District was and now is a public corporation of the State of Montana organized and existing and operating as an irrigation district under and by virtue of Chapter 146 of the Laws of 1909 of said State, and Acts amendatory thereof and supplemental thereto, and is a resident and citizen of the State of Montana, with its principal place of business at Bynum, Montana.

5.

A. That the plaintiff during all the times herein mentioned was and now is a corporation organized and existing under and by virtue of the laws of the State of Montana, and is a resident and citizen of the State of Montana, with its principal place of business at Brady, Montana, and was organized and has been operating solely and only for the pur-

pose of delivering water for irrigation and domestic purposes to its stockholders, and has been operated as a co-operative association and not for profit.

B. That no dividends have been paid by the plaintiff corporation to its stockholders, or earned, and the only income which it has is obtained from assessments levied against the outstanding capital stock consisting of 500 shares of the par value of \$100.00 each, and the proceeds from sale of the capital stock and said assessments have been devoted solely and only to the construction and maintenance of canals, ditches, dams, headgates and other improvements used for the purpose of conveying and diverting waters thru its own water rights from which is known as Muddy Creek in Teton County, Montana, and thru [4] the purchase of capital stock as hereinafter set forth from the reservoir of said Teton Co-operative Reservoir Company, for irrigation and domestic purposes to stockholders of said plaintiff corporation; that each share of the capital stock of said plaintiff corporation entitles the owners to the use, during the irrigating season of each year, of $1/500$ part of the waters owned and diverted by plaintiff and particularly of the waters received from the said reservoir of said defendant Teton Co-operative Reservoir Company, to which plaintiff is entitled by reason of its ownership of 156 shares of capital stock of said Reservoir Company.

C. That the plaintiff during all the times herein mentioned, has been and now is the owner of said 156 shares of capital stock of said Teton Co-operative Reservoir Company of the par value of \$150.00 per share, and is entitled at all times to 156/1000 part of the waters of said Teton Co-operative Reservoir Company delivered to plaintiff at the head-gates of said Reservoir, as is hereinafter more particularly set forth.

D. That Article V of Section VI of the By-laws of the plaintiff corporation, which is now and at all times herein mentioned was in full force and effect, reads as follows:

“Each share of the five hundred shares of the capital stock of this corporation represents and controls for such share, one five-hundredth part of all the waters appropriated and diverted by this corporation, and the owner of record of any share is entitled to control the use of said proportion of said waters of this corporation subject to such rules and regulations as may be hereafter adopted by said corporation or its board of directors.

That all of the said 500 shares of the capital stock of the above named plaintiff, have at all times herein mentioned, been, and now are, issued and outstanding.

6.

That during all the times herein mentioned, the above named defendant Teton Co-operative Reservoir Company was and now is a corporation duly organized and existing under and by virtue of the [5] laws of the State of Montana, and is a citizen and resident of said State of Montana with its principal place of business at Bynum, Montana, with a capital stock of 1000 shares of the par value of \$150.00 each, all of which is now and was at all times herein mentioned issued and outstanding.

That said defendant Teton Co-operative Reservoir Company ever since its organization has been and now is operated solely and only for the purpose of delivering water for irrigation and domestic purposes, and particularly for the irrigation of lands owned or controlled by the stockholders of said corporation, and said corporation has at no time been, nor now is operating for profit; that the only income which said last mentioned corporation has ever received has been from assessments levied against the outstanding capital stock of said corporation, and the proceeds from the sale of its capital stock and said assessments have been used solely and only for the purpose of maintaining, constructing and repairing the reservoir hereinafter particularly described, and the canals and ditches conveying water to said reservoir; and constructing, repairing and maintaining canals and ditches for the purpose of delivering water at its headgate to its

stockholders, at cost, for irrigation and domestic purposes.

7.

That during the year 1918 a by-law was adopted by the written consent of the holders of all of the capital stock of said company, then issued and outstanding, to-wit 1000 shares, and filed in the office of the Secretary of said corporation, and duly copied in the book of by-laws of said corporation, and by reason whereof the same was duly and regularly adopted by the stockholders of the above named defendant, Teton Cooperative Reservoir Company, providing among other things as follows, to-wit:

“A-1. Except as it is otherwise provided in these by-laws, each share of the capital stock of this company entitles the holder thereof to the use during the irrigating Season of each year, of a one-thousandth part of the waters, water rights and irrigating facilities and systems of this company, including the right to lease, pledge, sell and dispose of such use.”

That at the time of the adoption of the above by-law there was no other [6] by-law in existence that in any way modified or affected the force and effect of said by-law above set forth, and neither has there been any by-law adopted since that time by the defendant Teton Co-operative Reservoir Company that in any wise modified or changed said by-law, and that ever since the year 1918 said by-law has been, and now is, in full force and effect.

8.

That said defendant Teton Co-operative Reservoir Company, during all the times herein mentioned has been, and now is the owner of and entitled to the use and possession of, the following described lands and premises, located in the County of Teton, State of Montana, and more particularly described as follows, to-wit:

Parts of lots 3 and 4, Section 18, Township 25 North, Range 6 West.

East half of southeast quarter ($E\frac{1}{2}SE\frac{1}{4}$) of Section 11, township 25 North, range 7 West.

Southwest quarter ($SW\frac{1}{4}$), west half of southeast quarter ($W\frac{1}{2}SE\frac{1}{4}$) of Section 12, township 25 north, range 7 west.

Northwest quarter of northeast quarter ($NW\frac{1}{4}NE\frac{1}{4}$); North half of north half of northwest quarter ($N\frac{1}{2}N\frac{1}{2}NW\frac{1}{4}$) of Section 13, township 26 North, range 6 West.

Southwest quarter of northeast quarter ($SW\frac{1}{4}NE\frac{1}{4}$); Southeast quarter of northwest quarter ($SE\frac{1}{4}NW\frac{1}{4}$); North half of southwest quarter ($N\frac{1}{2}SW\frac{1}{4}$) of Section 32, township 26 North, range 6 West, consisting of 577.80 acres more or less according to the Government Survey thereof.

Together with a reservoir site on file and of record in the United States Land Office, which site covers and includes, for reservoir purposes, not less than 3387.19 acres of land located in township 26

North, range 7 West; Township 25 North, Range 7 West; Township 26 North, range 6 West, and township 25 North, range 6 West, of the Montana Meridian, in Teton County, Montana, which reservoir site as originally surveyed had a capacity of 67,500 acre feet of water, but which was afterwards increased to approximately 110,000 acre feet by the raising of the dams and reservoirs hereinafter described, after the said Bynum Irrigation [7] District became the owner as herein set forth, of 804 shares of the capital stock of said Teton Co-operative Reservoir Company.

9.

That defendant Teton Co-operative Reservoir Company since May, 1906, the date of its incorporation, to July 23, 1927, has constructed on said lands, reservoir site, premises and property, certain dams, reservoirs, ditches, canals and other works for the sole purpose of storing and supplying water for irrigation and domestic purposes to its stockholders, which had theretofore been appropriated by it out of the waters of the Teton River, the Muddy Creek and other rivers and creeks in Teton County, Montana, and since said last mentioned date has delivered at its headgate to the defendant Bynum Irrigation District, out of its said reservoir system eight hundred four one-thousandths ($804/1000$) of the water so diverted and stored pursuant to the provisions of the By-law set forth in paragraph 7 herein, and has since the year 1925 to the filing of

this complaint taken, diverted and used for irrigation and domestic purposes said water aforesaid within the corporate boundaries of said defendant Bynum Irrigation District, consisting of approximately 47,200 acres of land in Teton County, and the balance of the water in said reservoir system has been apportioned according to said By-law A-1, and used on lands and premises within the State of Montana, belonging to the stockholders of the above named plaintiff, to the extent of 156 shares, and the balance of 40 shares to various individuals.

10.

That the authorized capital stock of said defendant Teton Co-operative Reservoir Company consists of 1000 shares of the par value of \$150.00 each. That during the year 1925 the said Bynum Irrigation District became the owner of 804 shares of said capital stock, and ever since has been and now is the owner of the same, and has controlled and does now control the said Teton Co-operative Reservoir Company and the managements of its business and affairs, [8] thru its Board of Directors all of which, except one, are members of the Bynum Irrigation District, and are elected by and thru the Board of Directors and stockholders of said Irrigation District.

11.

That when said Bynum Irrigation District acquired said capital stock of said Teton Co-operative Reservoir Company, the said Bynum Irrigation

District was without water for the proper irrigation of the land controlled by it, and said Bynum Irrigation District purchased said 804 shares of said capital stock of the Teton Co-operative Reservoir Company by reason of the provision of the By-law set forth in paragraph 7 herein by which said shares each represented one-thousandth part in said Reservoir system, and for the sole and only purpose of providing the said Bynum Irrigation District with sufficient water to irrigate the lands within said district, and to do so it became necessary to provide funds to said Teton Co-operative Reservoir Company to-wit \$122,034.62 for the purpose of enlarging by approximately 4250 acre feet, said reservoir, and repairing its system for acquiring and storing waters for irrigation purposes.

12.

That on or about the 27th day of October, 1930, said defendant Winston Bros. Company, a corporation, commenced an action in the District Court of the Ninth Judicial District of the State of Montana in and for the County of Teton, against the above named defendant, Teton Co-operative Reservoir Company, a corporation, for the purpose of recovering a judgment on a promissory note made and delivered by said defendant, Teton Co-operative Reservoir Company to said Winston Bros. Company, a corporation, on or about the 23rd day of July, 1927.

That the promissory note on which said action of Winston Bros., a corporation was based, and upon which said judgment was granted represented the balance of an indebtedness due from said Teton Co-operative Reservoir Company to said Winston Bros. Company, incurred for [9] certain construction work performed by said Winston Bros. Company on the said reservoir and the canals and ditches used in connection therewith by which the same were enlarged and repaired as herein set forth; that when the agreement for said construction work was made by and between said Winston Bros. Company and said Teton Co-operative Reservoir Company, and while said construction work was being done, the said Winston Bros., and its officers, knew that the by-laws of said Teton Co-operative Reservoir Company provided that each share of the capital stock of said company entitled the holder thereof, to the use, during the irrigating season of each year, of a one-thousandth part of the waters, water rights and irrigating facilities and systems of said reservoir company, including the right to lease, pledge, sell and dispose of such use, and when said contract was made, and while said construction work was being performed by said Winston Bros. Company, the said Winston Bros. Company and its officers, knew that all of said lands, reservoir sites, premises and property on which said reservoir was located, were necessary to hold the water necessary to irrigate the lands and premises of said Bynum Irrigation District and the

land of the stockholders of said plaintiff corporation and others; that said construction work was done and accomplished thru the ownership by said Irrigation District of 804 shares out of 1000 shares of said Reservoir Company, all of which was known to said Winston Bros. Company who then and there had full knowledge of the by-law mentioned and set forth in paragraph 7 hereof.

That after the commencement of said last mentioned action the said defendant, Bynum Irrigation District, a public corporation, intervened in said action and thereafter and on or about the 6th day of December, 1935, a judgment was duly given, made and entered in said last mentioned action by the above entitled court, in favor of Winston Bros. a corporation, plaintiff and against Teton Co-operative Company, a corporation, defendant, for \$29,596.53 with interest at 6% until paid, a copy of which judgment is hereto annexed, marked "Exhibit A" and hereby made a part hereof.

That ever since said judgment was given and made as aforesaid, and for a long time prior thereto, the said defendant Bynum Irrigation District was and now is bankrupt and hopelessly insolvent. [10]

That said judgment of said Winston Bros. herein set forth and described, resulted from a balance due on a promissory note of \$18,851.96 with interest at 6%, dated July 23, 1927 to defendant Winston Bros., signed by the Teton Co-operative Reservoir Company after having paid in cash, all that was

due said Winston Bros., except said note on the contract for the enlargement and improvement of said reservoir, as called for by said contract amounting in all to \$122,034.62.

13.

That said defendant, Winston Bros. Company a corporation, under and by virtue of said judgment, claims a lien against the lands, reservoir sites, reservoir and premises owned by said defendant, Teton Co-operative Reservoir Company, located in said County of Teton, and hereinbefore described and said defendant, Winston Bros. Company, a corporation, has threatened to, and will, unless restrained by an order of this Court, apply for and obtain a writ of execution from the Clerk of said District Court for the purpose of enforcing said judgment, and will cause said lands, reservoir site, premises and property owned by said defendant, Teton Co-operative Reservoir Company, to be sold by the Sheriff of Teton County, Montana, under and by virtue of such writ of execution.

14.

That the plaintiff has agreed and is under legal obligation to supply its stockholders the proportionate share as hereinabove set forth, of the waters of said reservoir to which said stockholders are entitled by reason of the ownership of capital stock of said Reservoir Company by said plaintiff corporation as is hereinabove set forth, but if said defend-

ant, Winston Bros. Company, a corporation, causes said lands, reservoir, reservoir site, premises and property owned by said Teton Co-operative Reservoir Company to be sold under and by virtue of the writ of execution obtained in said action wherein said judgment was rendered against said Teton Co-operative Reservoir Company, then and in that event the plaintiff will be deprived of its ability to [11] deliver water for irrigation and domestic purposes to its stockholders and thereby be compelled to breach its agreement with and obligation to such stockholders to the irreparable damage of the plaintiff and its stockholders.

15.

That said judgment is in truth and in fact not a lien against said lands, reservoir site, premises and property owned by said Teton Co-operative Reservoir Company, and said lands are not subject to a sale under any writ of execution which may be obtained to enforce said judgment obtained by said Winston Bros. Company against said Teton Co-operative Reservoir Company for the reason that all of said lands, reservoir site, premises and property owned by said Teton Co-operative Reservoir Company are necessary and are being used for the purpose of conveying and storing waters for irrigation purposes for the irrigation of the lands within said Bynum Irrigation District and the lands belonging to the stockholders of the plaintiff

herein and other stockholders of said Teton Co-operative Reservoir Company, and said land, reservoir site, premises and property owned by said Teton Co-operative Reservoir Company are appurtenant to the lands of the stockholders of the plaintiff and said Bynum Irrigation District, a public corporation, and others owning the balance of its capital stock.

16.

That unless it be adjudged and decree by this Court that said judgment is not a lien against the said lands, reservoir site, premises and property of said Teton Co-operative Reservoir Company, and that said lands, reservoir site, premises and property can not be sold under and by virtue of a writ of execution issued upon said judgment, the said judgment will be and remain a cloud upon the title of said lands and premises of said Teton Co-operative Reservoir Company and the stockholders of said Bynum Irrigation District and of this plaintiff, and will cause serious and irreparable damage and injury to the plaintiff, its stockholders and the said Bynum [12] Irrigation District and its stockholders, and to the other stockholders of defendant, Teton Co-operative Reservoir Company.

17.

That a reservoir has been constructed on the said lands and premises of said Teton Co-operative Reservoir Company for the purpose of storing water

for irrigation purposes to be used on the lands and premises owned and controlled by its stockholders, located within said Bynum Irrigation District and the lands and premises belonging to the stockholders of said plaintiff and its other stockholders, which said reservoir contains not less than 3965 acres in area, and all of said land, premises, property, reservoir site and appurtenances are necessary to be occupied by said reservoir, canals, ditches, head-gates, and other improvements which are necessary for the conveyances, storage and distribution of said irrigation water to and from said reservoir.

18.

That during all the times herein mentioned said Reservoir has been each year and now is to be used for irrigation purposes as aforesaid, with a capacity of approximately 110,000 acre feet of water for irrigation.

19.

That 500 shares of the capital stock of said plaintiff corporation have been issued and now held by owners of approximately 10,000 acres of land in Pondera County, Montana, which is being irrigated with the waters from said reservoir on the lands and premises herein described.

20.

That all of the water stored in said reservoir is necessary for the proper irrigation of the lands

and premises which have been and now are being irrigated by said Bynum Irrigation District of the lands and premises belonging to the stockholders of the said Plaintiff, and the other stockholders of said Teton Co- [13] operative Reservoir Company.

Wherefore, Plaintiff prays judgment as follows:

That a temporary restraining order may be issued against said defendant, Winston Bros. Company, a corporation, its officers and agents, restraining them from causing said lands, reservoir site, premises and property belonging to said Teton Co-operative Reservoir Company from being sold under and by virtue of any writ of execution, which may be obtained under and by virtue of said judgment against the Teton Co-operative Reservoir Company, pending the hearing on a prayer for a permanent injunction herein and that said Winston Bros. Company be permanently enjoined from claiming any lien against said lands, reservoir site, premises and property of said Teton Co-operative Reservoir Company under and by virtue of said judgment and be permanently enjoined from causing any of said lands, reservoir site, premises and property of said Teton Co-operative Reservoir Company from being sold under and by virtue of any writ of execution which may be issued pursuant to said judgment;

That this court, pursuant to the power conferred under the Declaratory Judgment Act of the United States of America, declare the said judgment ob-

tained by said Winston Bros. Company against said Teton Co-operative Reservoir Company is not a lien against said lands and premises owned by said Teton Co-operative Reservoir Company and that said lands, reservoir site, premises and property can not be sold under and by virtue of any writ of execution which may be issued pursuant to said judgment;

That the Court pursuant to the power conferred under the Declaratory Judgment Act of the United States of America, declare that the said lands, water rights, canals, ditches, dams, reservoirs and reservoir sites and other improvements on said lands, reservoir sites, premises and property of said defendant, Teton Co-operative Reservoir Company used solely for the purpose of providing, storing and conveying water for irrigation and domestic purposes to the stockholders of [14] said Bynum Irrigation District, a public corporation, and the stockholders of the plaintiff herein, are appurtenant to the lands belonging to said stockholders of said Bynum Irrigation District and the plaintiff herein, and all other stockholders of the Teton Co-operative Reservoir Company.

That the Court, pursuant to the power conferred under the Declaratory Judgment Act of the United States of America, declare that the Brady Irrigation Company and its stockholders, their successors and assigns, have the right and authority to take at the headgate of the reservoir aforesaid of said Teton Co-operative Reservoir Company, 156-1000

part of all waters of said reservoir for the use and benefit of said stockholders, their successors and assigns, free and clear from any lien of the said judgment of said Winston Bros.

For the plaintiff's costs and disbursements herein incurred and expended and for such other and further relief as may be equitable, proper and just.

I. W. CHURCH

ART JARDINE

J. W. FREEMAN

J. N. THELEN

J. P. FREEMAN

ERNEST ABEL

Attorneys for Plaintiff [15]

State of Montana,
County of Cascade—ss.

J. W. Freeman, being first duly sworn, on oath deposes and says:

That he is the Secretary of the Brady Irrigation Company, a corporation, the above named plaintiff, and as such makes this verification for and on behalf of said plaintiff corporation.

That he has read the foregoing complaint and knows the contents thereof, and that the same are true to the best of his knowledge, information and belief.

J. W. FREEMAN

Subscribed and sworn to before me this 6th day of July, A.D. 1937.

EILEEN L. ARMS

Notary Public for the State of Montana. Residing at Great Falls, Montana. My commission expires March 28, 1940.

(Seal) [16]

EXHIBIT A.

In the District Court of the Ninth Judicial District of the State of Montana, in and for the County of Teton.

WINSTON BROS. COMPANY, a corporation,
Plaintiff,

vs.

TETON CO-OPERATIVE RESERVOIR COMPANY, a corporation,

Defendant,

and

BYNUM IRRIGATION DISTRICT, a public corporation,

Intervenor.

JUDGMENT.

This cause came on regularly for trial upon the 6th day of December, 1935, at ten o'clock A.M.

before the Honorable R. M. Hattersley, Judge of the above court without a jury, by agreement of counsel regularly filed herein, upon the complaint and the answer thereto of the defendant, Teton Co-operative Reservoir Company, a corporation, the default of the defendant as to that portion of said answer designated "further Answer to Plaintiff's complaint, and by way of defense thereto," commencing with paragraph one on page 2 of said answer, having been regularly entered by the Clerk of this Court, and the default of Bynum Irrigation District, a public corporation, Intervenor, having been regularly entered by the Clerk of this Court; the plaintiff being represented by its attorneys, Messrs. Cooper, Stephenson & Hoover, the defendant not appearing in Court. Whereupon the plaintiff having announced itself ready for trial and no person appearing for either the defendant or the intervenor, [17] oral testimony and documentary evidence was submitted by plaintiff in support of the allegations of the complaint. No evidence was submitted in support of the answer and the case was closed and argued to the court by counsel, and the court being satisfied from the evidence that all of the allegations contained in the complaint are true,

Now therefore, by virtue of the law and the premises,

It is hereby ordered, adjudged and decreed that plaintiff, Winston Bros. Company, a corporation,

do have and recover of and from the said defendant, Teton Co-operative Reservoir Company, a corporation, the sum of Twenty-eight thousand five hundred seventy-seven and 28/100 dollars (\$28,577.28) principal and interest upon the promissory note referred to in the complaint; the further sum of One thousand dollars (\$1000.00) hereby fixed and allowed by the plaintiff as a reasonable attorneys' fee; and the further sum of Nineteen and 25/100 dollars (\$19.25) plaintiff's costs and disbursements in this action, or a total sum of twenty-nine thousand, five hundred ninety-six and 53/100 dollars (\$29,596.53) together with interest thereon at the rate of six per cent (6%) per annum from the date hereof until paid.

And it is further ordered, adjudged and decreed that plaintiff have execution against the property of the defendant in the manner prescribed by law.

Given and made this 6th day of December, 1935.

R. M. HATTERSLEY,

Judge.

[Endorsed]: Filed July 21, 1937, C. R. Garlow, Clerk, by C. G. Kegel, Deputy. [18]

Thereafter, on September 8, 1937, a Motion to Dismiss was duly filed herein by Winston Bros. Company, a corporation, defendant herein, being in the words and figures following, towit: [19]

[Title of District Court and Cause.]

MOTION TO DISMISS

Comes now the defendant, Winston Bros. Company, a corporation, and files this Motion and hereby moves the court to dismiss the above-entitled action as to this defendant, and to dismiss plaintiff's bill of complaint on file in said action as to this defendant upon the ground and for the reason that said bill of complaint does not state facts sufficient to constitute a cause of action against this defendant or to entitle plaintiff to the relief sought, or any relief, against this defendant.

Wherefore, defendant prays that said action and said bill of complaint and said suit in equity be dismissed as to this defendant and that this defendant have and recover against plaintiff for its costs incurred herein.

Dated this 8th day of September, 1937.

R. H. GLOVER

S. B. CHASE, JR.

JOHN D. STEPHENSON,

Solicitors for defendant,
Winston Bros. Company,
410-First National Bank
Building, Great Falls,
Montana.

[Endorsed]: Filed Sept. 8, 1937. C. R. Garlow,
Clerk, by C. G. Kegel, Deputy. [20]

STATEMENT AND CONSENT UNDER
RULE 34:

The undersigned, solicitors, hereby pursuant to Rule 34 of the Rules of this Court designate the office of Cooper, Stephenson & Glover, 410-First National Bank Building, Great Falls, Montana, as the place within the District where service of all subsequent papers, except Writs and Process, may be made, and hereby consent that service of such papers may be made at such place upon said solicitors.

R. H. GLOVER

S. B. CHASE, JR.

JOHN D. STEPHENSON,

Solicitors for Winston Bros.
Company.

Service admitted and receipt of a copy of Motion to Dismiss in the above-entitled action acknowledged, this 8th day of September, 1937.

FREEMAN, THELEN &

FREEMAN

CHURCH & JARDINE

Attorneys for Plaintiff.

[Endorsed]: Filed Sept. 8, 1937. C. R. Garlow,
Clerk, by C. G. Kegel, Deputy. [21]

Thereafter, on December 3, 1937, a Complaint in Intervention was duly filed herein by C. K. Malone, Intervener, being in the words and figures following, towit: [22]

[Title of District Court.]

BRADY IRRIGATION COMPANY,
a corporation,

Plaintiff.

vs.

WINSTON BROS. COMPANY, a corporation;
TETON COOPERATIVE RESERVOIR
COMPANY, a corporation; and BYNUM
IRRIGATION DISTRICT, a public corpora-
tion,

Defendants.

C. K. MALONE, Intervenor.

COMPLAINT IN INTERVENTION.

Comes now the above named Intervenor, C. K. Malone, and for his complaint in Intervention herein complains and alleges:

I.

That during all the times herein mentioned, the above named defendant, Bynum Irrigation District, was and now is, a public corporation of the State of Montana, organized, existing and operating as an irrigation district under and by virtue of Chapter 146 of the Laws of 1909 of said State

and Acts amendatory thereof and supplemental thereto with its principal place of business at Bynum, Montana.

II.

That during all the times herein mentioned the above named defendant, Teton Cooperative Reservoir Company was and now is a corporation duly organized and existing under and by virtue of the laws of the State of Montana, and is a citizen and resident of said State of Montana, with its principal place of business at Bynum, Montana, with a capital stock of one thousand (1000) shares of the par value of One Hundred Fifty (\$150.00) Dollars each, all of which is now and was at all times herein mentioned issued and outstanding. [23] That said defendant, Teton Cooperative Reservoir Company, ever since its organization has been and now is operated solely and only for the purpose of maintaining a reservoir, ditches and canals and delivering water from the same for irrigation and domestic purposes to its stockholders; and said corporation has at no times nor now is, operated for profit; that the only income which said last mentioned corporation has ever received has been from the sale of its stock and from assessments levied against the outstanding capital stock of said corporation and the proceeds from the sale of its capital stock and such assessments have been used solely and only for the purpose of constructing, maintaining and repairing the reservoir hereinafter

described, and the canals and ditches conveying water to said reservoir.

III.

That during the year 1918, a by-law was adopted with the written consent of all the holders of the outstanding capital stock of said Teton Cooperative Reservoir Company and filed in the office of the Secretary of said corporation and duly copied in the book of by-laws of said corporation, providing among other things, as follows, to-wit:

“A-1. Except as it is otherwise provided in these by-laws, each share of the capital stock of this company entitles the holder thereof to the use during the irrigating season of each year, of a one-thousandth part of the waters, water rights and irrigating facilities and systems of this company, including the right to lease, pledge, sell and dispose of such use.”

That said by-law has at no time since its adoption been modified, repealed or changed and at the time of its adoption the same was not modified or affected by any by-law of said corporation then in effect.

IV.

That said defendant, Teton Co-operative Reservoir Company, during all the times herein mentioned has been, and now is the owner of and entitled to the use and possession of, the following described lands and premises, located in the County

of Teton, State [24] of Montana, and more particularly described as follows, to-wit:

Parts of lots 3 and 4, Section 18, Township 25 North, Range 6 West.

East half of southeast quarter ($E\frac{1}{2}SW\frac{1}{4}$) of Section 11, township 25 north, Range 7 West.

Southwest quarter ($SW\frac{1}{4}$), west half of southeast quarter ($W\frac{1}{2}SE\frac{1}{4}$) of Section 12, township 25 north, Range 7 west.

Northwest quarter of northeast quarter ($NW\frac{1}{4}NE\frac{1}{4}$); North half of north half of northwest quarter ($N\frac{1}{2}N\frac{1}{2}NW\frac{1}{4}$) of Section 13, township 26 North, Range 6 West.

Southwest quarter of northeast quarter ($SW\frac{1}{4}NE\frac{1}{4}$); Southeast quarter of northwest quarter ($SE\frac{1}{4}NW\frac{1}{4}$); North half of southwest quarter ($N\frac{1}{2}SW\frac{1}{4}$) of Section 32, township 26 North, range 6 West, consisting of 577.80 acres more or less according to the Government Survey thereof.

Together with a reservoir site on file and of record in the United States Land Office, which site covers and includes, for reservoir purposes, not less than 3387.19 acres of land located in township 26 North, range 7 West; Township 25 North, Range 7 West; Township 26 North, Range 6 West, and township 25 North, range 6 West, of the Montana Meridian, in Teton County, Montana, which reservoir site as originally surveyed had a capacity of 67,500 acre foot of water, but which was afterwards

increased to approximately 110,000 acre feet by the raising of the dams and reservoirs hereinafter described, after the said Bynum Irrigation District became the owner as herein set forth, of 804 shares of the capital stock of said Teton Cooperative Reservoir Company.

V.

That defendant, Teton Cooperative Reservoir Company since May, 1906, the date of its incorporation, to July 23, 1927, has constructed on said lands, reservoir site, premises and property, certain dams, reservoirs, ditches, canals and other works for the sole purpose of storing and supplying water for irrigation and domestic purposes to its stockholders, which had theretofore been appropriated by it out of the waters of the Teton River, the Muddy Creek and other rivers and creeks in Teton County, Montana, and [25] since said last mentioned date has delivered at its headgate to the defendant Bynum Irrigation District, out of its said reservoir system eight hundred four one-thousandths ($804/1000$) of the water so diverted and stored pursuant to the provisions of the by-laws set forth in paragraph 3 herein, and has since the year 1925 to the filing of this complaint taken, diverted and used for irrigation and domestic purposes said water aforesaid within the corporate boundaries of said defendant Bynum Irrigation District, consisting of approximately 47,200 acres of land in Teton County, and the balance of the

water in said reservoir system has been apportioned according to said by-law A-1, and used on lands and premises within the State of Montana, belonging to the stockholders of the above named plaintiff, to the extent of 156 shares, and the balance of 40 shares to various individuals.

VI.

That the authorized capital stock of said defendant Teton-Cooperative Reservoir Company consists of 1000 shares of the par value of \$150.00 each. That during the year 1925 the said Bynum Irrigation District became the owner of 804 shares of said capital stock, and ever since has been and now is the owner of the same, and has controlled and does now control the said Teton Cooperative Reservoir Company and the management of its business and affairs, thru its Board of Directors all of which, except one, are members of the Bynum Irrigation District, and are elected by and thru the Board of Directors and stockholders of said Irrigation District.

VII.

That when said Bynum Irrigation District acquired said capital stock of said Teton Cooperative Reservoir Company, the said Bynum Irrigation District was without water for the proper irrigation of the land controlled by it, and said Bynum Irrigation District purchased said 804 shares of said capital stock of the Teton Cooperative Reser-

voir Company by reason of the provision of the By-Laws set forth in paragraph 3 herein by which said shares each represented one- [26] thousandth part in said Reservoir system, and for the sole and only purpose of providing the said Bynum Irrigation District with sufficient water to irrigate the lands within said district, and to do so it became necessary to provide funds, to said Teton Cooperative Reservoir Company, to-wit \$122,034.62 for the purpose of enlarging by approximately 47,200 acre foot, said reservoir, and repairing its system for acquiring and storing waters for irrigation purposes.

VIII.

That on or about the 27th day of October, 1930, said defendant Winston Bros. Company, a corporation, commenced an action in the District Court of the Ninth Judicial District of the State of Montana in and for the County of Teton, against the above named defendant, Teton Cooperative Reservoir Company, a corporation, for the purpose of recovering a judgment on a promissory note made and delivered by said defendant, Teton Cooperative Reservoir Company to said Winston Bros. Company, a corporation, on or about the 23rd day of July, 1927.

That the promissory note on which said action of Winston Bros. Company, a corporation, was based, and upon which said judgment was granted represented the balance of an indebtedness due from

said Teton Cooperative Reservoir Company to said Winston Bros. Company, incurred for certain construction work performed by said Winston Bros. Company on the said reservoir and the canals and ditches used in connection therewith by which the same were enlarged and repaired as herein set forth, that when the agreement for said construction work was made by and between said Winston Bros. Company and said Teton Cooperative Reservoir Company, and while said construction work was being done, the said Winston Bros. Company, and its officers, knew that the by-laws of said Teton Cooperative Reservoir Company provided that each share of the capital stock of said company entitled the holder thereof, to the use, during the irrigating season of each year, of a one-thousandth part of the waters, water rights and irrigating facilities and system of said reservoir company, including the right [27] to lease, pledge, sell and dispose of such use, and when said contract was made, and while said construction work was being performed by said Winston Bros. Company, the said Winston Bros. Company and its officers, knew that all of said lands, reservoir sites, premises and property on which said reservoir was located, was necessary to hold the water necessary to irrigate the lands and premises of said Bynum Irrigation District and the land of the stockholders of said plaintiff corporation and others; that said construction work was done and accomplished thru the owner-

ship by said Irrigation District of 804 shares out of 1000 shares of said Reservoir Company, all of which was known to said Winston Bros. Company who then and there had full knowledge of the by-laws mentioned and set forth in paragraph 3 hereof.

That after the commencement of said last mentioned action the said defendant, Bynum Irrigation District, a public corporation, intervened in said action and thereafter and on or about the 6th day of December, 1935, a judgment was duly given, made and entered in said last mentioned action by the above entitled court, in favor of Winston Bros. Company, a corporation, plaintiff and against Teton Co-operative Company, a corporation, defendant for \$29,596.55, with interest at 6% until paid, a copy of which judgment is hereto annexed, marked "Exhibit B" and hereby made a part hereof.

That ever since said judgment was given and made as aforesaid, and for a long time prior thereto, the said defendant Bynum Irrigation District was and now is bankrupt and hopelessly insolvent.

That said judgment of said Winston Bros. herein set forth and described, resulted from a balance due on a promissory note of \$18,851.96 with interest at 6%, dated July 23, 1927, to defendant Winston Bros. Company, signed by the Teton Co-operative Reservoir Company after having paid in cash, all that was due said Winston Bros. Company except said note on the contract for the enlargement and improvement of said reservoir, as called for by said contract amounting in all to \$122,034.62. [28]

IX.

That said defendant, Winston Bros. Company, a corporation, under and by virtue of said judgment, claims a lien against the lands, reservoir sites, reservoir and premises owned by said defendant, Teton Co-operative Reservoir Company, located in said County of Teton, and hereinbefore described and said defendant, Winston Bros. Company, a corporation, has threatened to, and will, unless restrained by an order of this Court, apply for and obtain a writ of execution from the Clerk of said District Court for the purpose of enforcing said judgment, and will cause said lands, reservoir site, premises and property owned by said defendant, Teton Co-operative Reservoir Company, to be sold by the Sheriff of Teton County, Montana, under and by virtue of such writ of execution.

X.

That said judgment is in truth and in fact not a lien against said lands, reservoir site, premises and property owned by said Teton Co-operative Reservoir Company, and said lands are not subject to a sale under any writ of execution which may be obtained to enforce said judgment obtained by said Winston Bros. Company against said Teton Co-operative Reservoir Company for the reason that all of said lands, reservoir sites, premises and property owned by said Teton Co-operative Reservoir Company are necessary and are being used for the purpose of conveying and storing waters for irrigation

purposes for the irrigation of the lands within said Bynum Irrigation District and the lands belonging to the stockholders of the plaintiff herein and other stockholders of said Teton Co-operative Reservoir Company, and said land, reservoir site, premises and property owned by said Teton Co-operative Reservoir Company are appurtenant to the lands of the stockholders of the plaintiff and said Bynum Irrigation District, a public corporation, and others owning the balance of its capital stock.

XI.

That a reservoir has been constructed on the said lands [29] and premises of said Teton Co-operative Reservoir Company for the purpose of storing water for irrigation purposes to be used on the lands and premises owned and controlled by its stockholders, located within said Bynum Irrigation District and the lands and premises belonging to the stockholders of said plaintiff and its other stockholders, which said reservoir contains not less than 3965 acres in area, and all of said land, premises, property, reservoir site and appurtenances are necessary to be occupied by said reservoir, canals, ditches, headgates and other improvements which are necessary for the conveyance, storage and distribution of said irrigation water to and from said reservoir.

XII.

That during all the times herein mentioned said Reservoir has been each year and now is used for

irrigation purposes as aforesaid, with a capacity of approximately 110,000 acre feet of water for irrigation.

XIII.

That all of the water stored in said reservoir is necessary for the proper irrigation of the lands and premises which have been and now are being irrigated in said Bynum Irrigation District of the lands and premises belonging to the stockholders of the said plaintiff, and the other stockholders of said Teton Co-operative Reservoir Company.

XIV.

That prior to the first day of July, 1925, a Board of Commissioners of said Bynum Irrigation District was duly elected and qualified pursuant to the Statutes of the State of Montana in such cases made and provided, and prior to said first day of July, 1925, more than 60% in number and acreage of holders of title or evidence of title to the lands included within said Bynum Irrigation District signed a petition whereby the District Court of the Nineteenth Judicial District (now Ninth Judicial District) of the State of Montana, in and [30] for the County of Teton, was petitioned for leave to authorize the issuance of bonds for the purpose of selling such bonds and with the proceeds of such sales to purchase said stock of said Teton Co-operative Reservoir Company, in order to obtain rights to the use of the water for irrigation purposes within said Bynum Irrigation District and for the

further purpose of constructing canals, headgates, ditches and other improvements used for the conveyance of water from the reservoir constructed and maintained by said Teton Co-operative Reservoir Company, and thereafter the Board of County Commissioners of said Bynum Irrigation District, by an appropriate order or resolution, authorized and directed the issuance of bonds of the said Bynum Irrigation District to the amount of one million dollars (\$1,000,000.00) said bonds being numbered consecutively from one to one thousand, both inclusive, and all being of like tenor, date and effect, except as to the number and date of payment thereof.

XV.

That thereafter by an order duly given, made and entered by the said District Court of Teton County, Montana, the said proposal of said Bynum Irrigation District, pertaining to the issuance of such bonds and the said bonds were duly confirmed by said District Court.

That all of the said bonds of said Irrigation District were thereafter sold by said Bynum Irrigation District, and the proceeds of the sales of the same were used for the purpose of purchasing shares of the capital stock of said Teton Co-operative Reservoir Company in order to obtain the right to the use of water for irrigation purposes within said Bynum Irrigation District and for the further purpose of constructing canals, head gates, ditches and other improvements used for the con-

veyance of water from the reservoir constructed and maintained by said Teton Co-operative Reservoir Company.

XVI.

That prior to the commencement of the above entitled [31] action, your Intervenor, for a valuable consideration, became the owner of and ever since has been and now is the owner of ten (10) of said bonds, numbered respectively as follows: Seventeen (17) to Twenty-five (25) inclusively each being for the sum of One thousand dollars (\$1,000.00) and the dates of payments of said bonds being respectively as follows: A. D. 1931 and bond No. 808 not yet due. That a copy of one of said bonds is hereto annexed, marked Exhibit A and hereby made a part of this complaint.

XVII.

That no part of the sums specified in said bonds, owned by your Intervenor, have been paid.

XVIII.

That Section 7213 of the Revised Codes of Montana 1935 is the same as Section 7213 of the Revised Codes of Montana, 1921, and the same was in full force and effect during all the times herein mentioned and provides as follows:

“Lien of Bonds: All bonds issued hereunder, and all amounts to be paid to the United States under any contract between the district and the United States, accompanying which

bonds of the district have not been deposited with the United States as in Section 7174 provided, shall be a lien upon all the lands originally or at any time included in the district for the irrigation and benefit of which said irrigation district was organized, and said bonds were issued, and for the benefit of which such contract between the district and the United States was made, except upon such lands as may at any time be included in such district on account of the exchange or substitution of water under the provisions of Section 7206 of this act, if any there be; and all such lands shall be subject to a special tax or assessment for the payment of the interest on and principal of said bonds; and all amounts to be paid to the United States under any such contract between the district and the United States, and said special tax or assessment, shall constitute a first and prior lien on the land against which levied, to the same extent and with like force and effect as taxes levied for State and County Purposes.”

That by reason of the ownership of the bonds herein set forth, this intervenor has a lien against all of the lands within said Bynum [32] Irrigation District, all of which were prior to the irrigation of the same, semi-arid lands, and would not profitably produce crops without irrigation.

XIX.

That ever since the construction of the reservoir herein mentioned by said Teton Cooperative Reservoir Company, the lands in said Bynum Irrigation District have been and now are irrigated with waters from said reservoir constructed and maintained by said Teton Cooperative Reservoir Company, which said waters are the only available means of irrigating said lands.

XX.

That if the lands owned by said Teton Cooperative Reservoir Company should be sold under and by virtue of any writ of execution, issued on said judgment of said Winston Bros. Company, then and in that event the said Bynum Irrigation District would be deprived of the right to the use of waters from said Irrigation system constructed and maintained by said Teton Cooperative Reservoir Company and your Intervenor would be deprived of part of his security in that the lands within the said Bynum Irrigation District, if not irrigated, would be worth a great deal less than if irrigated or if the right to the use of the water from said irrigation system existed.

XXI.

That unless it be adjudged and decreed by this court that said judgment owned by said Winston Bros. Company is not a lien against the said lands, Reservoir site and property of said Teton Cooper-

ative Reservoir Company, and that said lands, Reservoir site and property cannot be sold under and by virtue of a writ of execution, issued upon said judgment, the said judgment will be and remain a cloud upon title of the lands and said premises of said Teton Cooperative Reservoir Company, and the lands and premises within said Bynum Irrigation District, and will cause serious and irreparable damage and injury to this Intervenor. [33]

XXII.

That there were a total of One Thousand (1000) bonds issued by said Bynum Irrigation District similar to the Ten (10) bonds belonging to your Intervenor and all of said bonds under and by virtue of the Provisions contained in the same and the laws of the State of Montana in such cases made and provided, are a lien upon all of the land situated in said Bynum Irrigation District and therefore, this Intervenor has no adequate remedy at law for the purpose of individually enforcing the payment of the bonds owned by this Intervenor, in that he is prevented from instituting an action for the purpose of enforcing the payment of his said bonds for the reason that all of said bonds are a lien upon all of the lands situated in said Bynum Irrigation District and no individual holder of such bonds as this plaintiff has a lien which is separable from the lien of all of said bonds.

Wherefore, Plaintiff prays judgment as follows:

That a temporary restraining order may be issued against said defendant, Winston Bros. Com-

pany, a corporation, its officers and agents, restraining them from causing said lands, reservoir site, premises and property belonging to said Teton Cooperative Reservoir Company from being sold under and by virtue of any writ of execution, which may be obtained under and by virtue of said judgment against the Teton Cooperative Reservoir Company, pending the hearing on a prayer for a permanent injunction herein and that said Winston Bros. Company be permanently enjoined from claiming any lien against said lands, reservoir site, premises and property of said Teton Cooperative Reservoir Company under and by virtue of said judgment and be permanently enjoined from causing any of said lands, reservoir site, premises and property of said Teton Cooperative Reservoir Company from being sold under and by virtue of any writ of [34] execution which may be issued pursuant to said judgment;

That this court, pursuant to the power conferred under the Declaratory Judgment Act of the United States of America, declare the said judgment obtained by said Winston Bros. Company against said Teton Cooperative Reservoir Company is not a lien against said lands and premises owned by said Teton Cooperative Reservoir Company and that said lands, reservoir site, premises and property cannot be sold under and by virtue of any writ of execution which may be issued pursuant to said judgment;

That the Court pursuant to the power conferred under the Declaratory Judgment Act of the United

States of America, declare that the said lands, water rights, canals, ditches, dams, reservoir sites, premises and property of said defendant, Teton Cooperative Reservoir Company are used solely for the purpose of providing, storing and conveying water for irrigation and domestic purposes to the stockholders of said Bynum Irrigation District, a public corporation, and the stockholders of the Plaintiff herein, and are appurtenant to the lands belonging to said stockholders of said Bynum Irrigation District and the plaintiff herein, and all other stockholders of the Teton Cooperative Reservoir Company.

That the Court, pursuant to the power conferred under the Declaratory Judgment Act of the United States of America, declare that the Stockholders of said Teton Cooperative Reservoir Company, their successors and assigns, have the right and authority to take at the headgate of the reservoir aforesaid of said Teton Cooperative Reservoir Company, all of the waters of said Reservoir for the use and benefit of said stockholders, their successors and assigns, free and clear from any lien of the said judgment of said Winston Bros. Company.

That the Court pursuant to the power conferred by virtue of Declaratory Judgment Act of the United States of America, declare that this Intervenor by reason of his ownership of said bonds has a [35] lien upon the right to the use of 804/1000 part of the waters diverted, stored and conveyed by means of the ditches, canals and reservoir on

the lands of said Teton Cooperative Reservoir Company.

For such other and further relief as may be equitable, proper and just.

GEO. COFFEY,

Atty. [36]

State of Montana
County of Teton—ss.

C. K. Malone, being first duly sworn, on oath deposes and says:

That he is the Intervenor named in the foregoing complaint;

That he has read said complaint and knows the contents thereof, and that the allegations therein contained are true of his own knowledge, except as to those therein stated upon information and belief, and as to them he believes the same to be true.

C. K. MALONE

Subscribed and sworn to before me this 30th day of September, A. D. 1937.

GEORGE COFFEY

Notary Public for the State
of Mont. Residing at Choteau,
Montana. My commission expires
Dec. 28, 1939.

(Seal) [37]

EXHIBIT "A"

United States of America

Number

17

Dollars

1000

State of Montana

County of Teton.

BYNUM IRRIGATION DISTRICT

Six Per Cent Gold Bond

First Issue

For value received, Bynum Irrigation District, a public corporation of the State of Montana, promises to pay to the bearer, or if this bond is registered, then to the registered holder hereof, the sum of One Thousand Dollars in gold coin of the United States of America, of the present standard of weight and fineness, the first day of January, 1931, at the Office of the County Treasurer of Teton County, Choteau, Montana, or at the Hanover National Bank of New York City, at the option of the holder, together with the interest thereon from the date hereof at the rate of six per cent per annum, payable semi-annually, in like gold coin, on the first days of January and July of each year during the period of this bond, upon presentation and surrender of the respective coupons hereto attached as they severally become due and payable.

This bond is one of a series of 1,000 coupon bonds, numbered consecutively from 1 to 1000, both inclusive, all being of like tenor, date and effect, except as to the number and date of payment

thereof, and all issued under and pursuant to a resolution of the Commissioners of said Bynum Irrigation District, duly and regularly adopted on the twenty-sixth day of June, 1925, and confirmed by the District Court of the Nineteenth Judicial District of the State of Montana, in and for the County of Teton, as provided for by the laws of the State of Montana, and all being a lien upon all the land situated in said Bynum Irrigation District, as provided for by the laws of Montana.

This bond shall pass by delivery unless it has been registered on the books of the County Treasurer of Teton County, Montana, and may be so registered as to the principal thereof upon application to said Treasurer. Such registration of ownership shall be noted hereon and after such registration of this bond no transfer shall be valid unless it be made on the books of said Treasurer by the registered owner thereof in person, or by attorney duly authorized, and similarly noted hereon. This bond may, however, be discharged from the effect of such registration by being transferred on said books to the bearer and thereafter transferability by delivery shall be restored. It may, however, from time to time be again registered or again transferred to bearer as before. Such registration shall not, however, affect the negotiability of the coupons, which shall always be transferable by delivery merely.

This bond shall not become valid until authenticated by the signatures of the President and Secre-

tary of Bynum Irrigation District. The interest coupons attached to this bond may be authenticated by the engraved facsimile signatures of its President and Secretary. [38]

In witness whereof, said Bynum Irrigation District has caused this bond to be signed by the President and attested by the Secretary of its Board of Commissioners under its corporate seal, and in addition thereto has caused the interest coupons hereunto attached to be executed by the facsimile signatures of its President and Secretary, this first day of July, 1935.

W. D. JONES

President.

Attest:

E. B. NOBLE

Secretary.

(Corporate seal of Bynum Irrigation District)

[39]

(Back)

United States of America

State of Montana

County of Teton

BYNUM IRRIGATION DISTRICT

Six Per Cent Gold Bond

First Issue

\$1000

Dated July 1, 1925—January 1, 1931.

Interest 6% Per Annum—Payable Semi-Annually on January 1 and July 1.

Both principal and Interest payable at the County Treasurer's Office, Choteau, Montana, or at The Hanover National Bank, New York, N. Y. At the option of the Holder.

ENDORSEMENTS:

State of Montana,
County of Teton.—ss.

We, the undersigned, do hereby severally certify that we have made and kept a record of the within bond in our respective offices pursuant to law.

E. B. NOBLE

Secretary Bynum Irrigation
District.

OTTO WAYNILD

Treasurer Teton County,
Montana.

Date, Name of Registered Owner, Signature.

Helena, Montana, July 1, 1925.

I, C. T. Stewart, Secretary of State of the State of Montana, do hereby certify that the within bond No. 17, of Issue No. One, of Bynum Irrigation District, issued July, 1925, is in accordance with an Act of the Legislature of Montana approved March 5, 1921, a legal investment for all trust funds and for the funds of all Insurance Companies, Banks, both Commercial and Savings, Trust Companies, state school funds, and any funds which may be

invested in county, municipal or school district bonds, and it may be deposited as security for the performance of any act whenever the bonds of any county, city, city and county, or school district may be so deposited, it being entitled to such privileges by virtue of an examination by the State Engineer, the Attorney General and State Examiner of the State of Montana, in pursuance of said Act. The within bond may also, according to the Constitution of the State of Montana, be used as security for the deposit of public money in banks in said State.

C. T. STEWART

Secretary of the State of the
State of Montana.

(Great Seal of State)

State of Montana,
County of Teton—ss.

In the District Court of the Nineteenth Judicial
District in and for the County of Teton

The issuance of this bond, and of the other bonds of the issue of which this bond is one, has been ratified, approved and confirmed by the decree of the said District Court.

Witness my hand and seal of said Court this
10th day of September, A. D. 1925.

[Court Seal] BLANCHE M. JACOBSON

Clerk of the District Court
of Teton County, Mont.

By MEDA McLEAN

EXHIBIT "B"

In the District Court of the Ninth Judicial District
of the State of Montana, in and for the County
of Teton.

WINSTON BROS. CO., a corporation,

Plaintiff.

vs.

BYNUM IRRIGATION DISTRICT, a public
corporation,

Intervenor.

JUDGMENT

This cause came on regularly for trial upon the 6th day of December, 1935, at ten o'clock A.M. before the Honorable R. M. Hattersley, Judge of the above court without a jury, by agreement of counsel regularly filed herein, upon the complaint and the answer thereto of the defendant, Teton Co-operative Reservoir Company, a corporation, the default of the defendant as to that portion of said answer designated "further Answer to Plaintiff's complaint, and by way of defense thereto," commencing with paragraph one on Page Two of said answer, having been regularly entered by the Clerk of this Court, and the default of Bynum Irrigation District, a public corporation, Intervenor, having been regularly entered by the Clerk of this Court; the plaintiff being represented by its attorneys, Messrs. Cooper Stephenson & Hoover, the defend-

ant not appearing in Court. Whereupon the plaintiff having announced itself ready for trial and no person appearing for either the defendant or the intervenor, oral testimony and documentary evidence was submitted by plaintiff in support of the allegations of the complaint. No evidence was submitted in support of the answer and the case was closed and argued to the court by counsel, and the court being satisfied from the evidence [41] that all of the allegations contained in the complaint are true,

Now therefore, by virtue of the law and the premises,

It is hereby ordered, adjudged and decreed that plaintiff, Winston Bros. Company, a corporation, do have and recover of and from the said defendant, Teton Co-Operative Reservoir Company, a corporation, the sum of Twenty-eight thousand five Hundred Seventy-Seven and 28/100 dollars (\$28,577.28) principal and interest upon the promissory note referred to in the complaint; the further sum of One Thousand Dollars (\$1000.00) hereby fixed and allowed by the plaintiff as a reasonable attorneys' fee; and the further sum of Nineteen and 25/100 dollars (\$19.25) plaintiff's costs and disbursements in this action, or a total sum of Twenty-Nine Thousand, Five Hundred Ninety-six and 53/100 Dollars (\$29,596.53) together with interest

thereon at the rate of six per cent (6%) per annum from the date hereof until paid.

And it is further ordered, adjudged and decreed that plaintiff have execution against the property of the defendant in the manner prescribed by law.

Given and made this 6th day of December, 1935.

R. M. HATTERSLEY,
Judge.

Service of the within complaint and receipt of copy are hereby acknowledged this 5th day of October, 1937.

FREEMAN, THELEN &
FREEMAN,
Attorneys for Plaintiff.

[Endorsed]: Filed Nov. 23, 1937, C. R. Garlow,
Clerk. [42]

[Title of District Court and Cause.]

MOTION TO DISMISS COMPLAINT
IN INTERVENTION

Comes now the defendant, Winston Bros. Company, a corporation and files its motion and moves the court to dismiss the complaint in intervention on file in said action as to this defendant, and to dismiss the cause of action sought to be alleged against this defendant in said complaint in intervention on the ground and for the reason that said

complaint in intervention does not state facts sufficient to constitute a cause of action against this defendant or to entitle the intervenor to the relief sought, or any relief, against this defendant.

Wherefore, defendant prays that said complaint in intervention be dismissed as to this defendant and that this defendant have and recover against the intervenor for its costs incurred herein.

Dated Dec. 2, 1937.

R. H. GLOVER

S. B. CHASE, JR.

JOHN D. STEPHENSON

Solicitors for the defendant,
Winston Bros. Company.
410-First National Bank
Bldg., Great Falls, Montana.

[Endorsed]: Filed Dec. 3, 1937, C. R. Garlow,
Clerk. [43]

Thereafter, on March 11, 1938, an Order granting leave to James A. Ackroyd, et al, to Intervene herein, was duly filed herein, being in the words and figures following, towit: [44]

[Title of District Court.]

JAMES A. ACKROYD, DWIGHT S. BRIGHAM,
MORRIS F. LaCROIX, EARLE L. CARTER,
J. EDWARD STEVENS, and FRANK E.
NELSON,

Intervenors,

vs.

BRADY IRRIGATION COMPANY,
a corporation,

Plaintiff;

and

WINSTON BROTHERS COMPANY, a corpora-
tion, TETON CO-OPERATIVE RESERVOIR
COMPANY, a corporation, and BYNUM IR-
RIGATION DISTRICT, a public corporation,

Defendants;

and

C. K. MALONE,

Intervenor.

Respondents.

ORDER

This cause coming on to be heard this 11th day of March, 1938, on the petition of James A. Ackroyd, Dwight S. Brigham, Morris F. LaCroix, Earle L. Carter, J. Edward Stevens, and Frank E. Nelson for leave to intervene and to be made parties thereto, and the petition having been duly considered, and it appearing to the court that the petitioners have an interest in the above entitled

action sufficient to warrant their becoming parties to the same, and it further appearing to the court that the parties to the said action or their counsel have consented to [45] the intervention prayed for;

It is, therefore, ordered, adjudged and decreed that James A. Ackroyd, Dwight S. Brigham, Morris F. LaCroix, Earle L. Carter, J. Edward Stevens, and Frank E. Nelson, be, and they are hereby, granted leave to intervene in said action and to file a bill in intervention therein;

And it is further ordered, adjudged and decreed that any party to the said action may plead to the said bill in intervention at any time within ten days from and after service of a copy of this order.

Dated this 11th day of March, 1938.

CHARLES N. PRAY,

U. S. District Judge.

[Endorsed]: Filed March 11, 1938, C. R. Garlow, Clerk. [46]

Thereafter, on March 11, 1938, a Bill of Intervention was duly filed herein by James A. Ackroyd, et al, Interveners, being in the words and figures following, towit: [47]

[Title of District Court and Cause.]

BILL OF INTERVENTION

Come now the Intervenors, James A. Akroyd, Dwight S. Brigham, Morris F. LaCroix, Earle L. Carter, J. Edward Stevens and Frank E. Nelson,

above named, by leave of court first had and obtained, and file this their bill of intervention against the above named Respondents, and complain and allege:

I.

That insofar as the same are not inconsistent with the allegations of the said Intervenors all of the allegations of the complaint herein are hereby referred to and made a part of this bill of intervention; [48]

II.

That at the time of the commencement of the above entitled action the Intervenors, James A. Ackroyd, Dwight S. Brigham, Morris F. LaCroix, Earle L. Carter and J. Edward Stevens, were, ever since have been and now are citizens and residents of the State of Massachusetts, and the Intervenor, Frank E. Nelson, was, ever since has been and now is a citizen and resident of the State of Illinois;

III.

That at all of the times mentioned in Plaintiff's complaint the said Plaintiff was, ever since has been and now is a corporation duly created, organized and existing under and by virtue of the laws of the State of Montana, and a citizen and resident of the State of Montana;

IV.

That ever since long prior to the institution of the above entitled action the Defendant, Winston

Brothers Company, has been and now is a corporation duly created, organized and existing under and by virtue of the laws of the State of Minnesota, and a citizen and resident of the State of Minnesota;

V.

That the above entitled action, as to the claims of both the Plaintiff and the said Intervenors, is one of a civil nature wherein the matter in controversy exceeds, exclusive of interest and costs, the sum or value of \$3,000.00, and is between citizens of different states;

VI.

That Bynum Irrigation District, named in Plaintiff's complaint, is a public corporation duly created, organized and now existing as such under the provisions of Chapter 146, Laws of Montana, 1909, and the acts amendatory thereof and supplemental thereto, and that ever since on or about the year 1925 the said Bynum Irrigation District has been engaged in business as an [49] irrigation district and, primarily, to provide the lands within the said district with water to irrigate the same;

VII.

That on or about the 1st day of July, 1925, the said Bynum Irrigation District duly issued, negotiated and sold its six per cent gold bonds, of the aggregate principal amount of \$1,000,000, dated July 1st, 1925, and payable serially as follows, to-wit:

\$15,000	January 1, 1930
\$20,000	January 1, 1931
\$20,000	January 1, 1932
\$20,000	January 1, 1933
\$20,000	January 1, 1934
\$25,000	January 1, 1935
\$25,000	January 1, 1936
\$25,000	January 1, 1937
\$25,000	January 1, 1938
\$30,000	January 1, 1939
\$30,000	January 1, 1940
\$30,000	January 1, 1941
\$35,000	January 1, 1942
\$35,000	January 1, 1943
\$40,000	January 1, 1944
\$40,000	January 1, 1945
\$45,000	January 1, 1946
\$50,000	January 1, 1947
\$50,000	January 1, 1948
\$50,000	January 1, 1949
\$50,000	January 1, 1950
\$55,000	January 1, 1951
\$60,000	January 1, 1952
\$65,000	January 1, 1953
\$70,000	January 1, 1954
\$70,000	January 1, 1955

VIII.

That the said bonds were all of like date, tenor and effect, save only as to the numbers and date of payment thereof, and that a true and correct copy of one of the said bonds (exclusive of the interest coupons annexed to the same) is hereto attached, marked Exhibit "A" and hereof made a part;

IX.

That the Intervenors, James A. Ackroyd, Dwight S. Brigham, Morris F. LaCroix, Earle L. Carter, J. Edward Stevens, and Frank E. [50] Nelson, are the owners and holders of 923 of said bonds, aggregating the total principal amount of \$923,000, and that a list of the said bonds so owned and held by the said Intervenors is as follows, to-wit:

Bond Numbers	Maturity Date	Aggregate Principal Amount
1, 5 to 11, both incl. & 14 and 15.....	1/1/30	\$ 10,000
16 & 26 to 35, both incl.....	1/1/31	11,000
36 to 55, both incl.....	1/1/32	20,000
56 to 75, both incl.....	1/1/33	20,000
76 to 95, both incl.....	1/1/34	20,000
96 to 107, both incl. & 113 to 120, incl.	1/1/35	20,000
121 to 145, both incl.....	1/1/36	25,000
146 to 170, both incl.....	1/1/37	25,000
171 to 195, both incl.....	1/1/38	25,000
196 to 225, both incl.....	1/1/39	30,000
228 to 255, both incl.....	1/1/40	28,000
256 to 268, both incl. & 271 to 284, both incl.	1/1/41	27,000
286 to 320, both incl.....	1/1/42	35,000
321 to 355, both incl.....	1/1/43	35,000

Bond Numbers	Maturity Date	Aggregate Principal Amount
356, 357, 358, 360 to 391, both incl. and 393, 394 and 395.....	1/1/44	38,000
396 to 413, both incl. & 419 to 435, both incl.	1/1/45	35,000
436 to 480, both incl.....	1/1/46	45,000
481 to 490, both incl. 492, 493, 496, 498, 499, 501 to 512, both incl., 514 to 520 both incl. & 520 to 530, both incl.....	1/1/47	43,000
531 to 535, both incl. & 542 to 580, both incl.	1/1/48	44,000
581 to 630, both incl.....	1/1/49	50,000
632, 633, 636 to 649, both incl. 651 to 671, both incl. & 673 to 680, both incl.	1/1/50	45,000
681 to 735, both incl.....	1/1/51	55,000
736 to 782, both incl. 784 to 795, both incl.	1/1/52	59,000
796 to 805, both incl., 807, 809, and 811 to 860, both incl.....	1/1/53	62,000
861 to 890, both incl. 895 to 930, both incl.	1/1/54	66,000
941 to 951, both incl. & 962 to 1,000, both incl.	1/1/55	50,000
Total.....		\$923,000

[51]

X.

That none of the bonds so listed as above and owned and held by the said Intervenor has been paid;

XI.

That ever since on or about the year 1906 Teton Co-Operative Reservoir Company, named in Plaintiff's complaint, has been, and now is, a corporation,

duly created, organized and existing under and by virtue of the Laws of the State of Montana; that the said Company was organized primarily to make water appropriations under the laws of the State of Montana and to distribute water for the irrigation of lands within the said state; that the said Company has made appropriations of water and has constructed a reservoir into which the said waters have been diverted and there impounded and that the waters so appropriated, diverted and impounded have been distributed by the said Company to large tracts of land that have been irrigated by the same; that in the conduct of its business the said Company has acquired and now owns and holds real estate in Teton County, Montana; that it has constructed improvements thereon consisting of the said reservoir, embankments for the same, dams, headgates, canals, and other necessary structures for the proper diversion, impounding and distribution of waters for irrigation purposes, and that all of the said real estate is needed by the said Company for the conduct of its business.

XII.

That the said Teton Co-Operative Reservoir Company has engaged in no other business than the appropriation, diversion, impounding and distribution of water for the irrigation of lands, and that such business has been conducted at all times without profit to the said Company or its stockholders; that water has been so distributed by the said Com-

pany at the actual cost of the service and for the use of its stockholders and no other persons whomsoever; that each share of the capital stock of the said Company represents the right of the owner and holder thereof to an [52] undivided one-thousandths part of the water appropriated, impounded and distributed by the said Company; that at all times since the organization of the said Company the said capital stock has evidenced the ownership of a right to water for the irrigation of land and to the extent hereinbefore set forth; and that the said Company has been operated at all times since its organization only as an instrumentality or agency of its stockholders for the appropriation, impounding and distribution of water for the irrigation of lands;

XIII.

That Bynum Irrigation District was organized for the purpose of irrigating large tracts of land in Teton County, Montana, and that on or about the year 1925 the said Bynum Irrigation District, being wholly without water for the irrigation of such land, made and entered into an agreement to purchase, for a consideration of \$500,000.00 payable from the proceeds of the \$1,000,000.00 bond issue above mentioned, eight hundred four shares of the capital stock of the said Teton Co-Operative Reservoir Company, being 80.4% of the issued and outstanding capital stock of the said Company, to the end that thereby the said Bynum Irrigation District might acquire an adequate supply of water for the

irrigation of the lands within the said District; that on or about the year 1925 one W. A. Thaanum, an owner of land in the said District, instituted a certain action to restrain the said District and its Board of Commissioners from expending any money belonging to the said District for the purchase of the said eight hundred four shares of capital stock above mentioned, and that thereafter in the said action, and on or about the year 1925, the Supreme Court of the State of Montana duly adjudged that the said District and its said Board of Commissioners, by virtue of the provisions of Subdivision 3, Section 7174, Revised Codes of Montana, 1921, as amended by Chapter 157, Laws of Montana, 1923, had the power and authority to purchase the said eight hundred four shares of capital [53] stock of Teton Co-Operative Reservoir Co., and that the judgment rendered is in full force, virtue and effect; that thereafter and on or about the 15th day of September, 1925, the said Bynum Irrigation District duly purchased the said eight hundred four shares of the capital stock of the said Teton Co-Operative Reservoir Co. and the water rights evidenced thereby, and ever since the purchase thereof has owned and held the same; that the said capital stock of the said Teton Co-Operative Reservoir Co. so purchased, as aforesaid, constitutes and is the sole source of water supply for the said Bynum Irrigation District and is indispensable, in its entirety, to the conduct of the business of the said Bynum Irrigation District as a

public corporation of the State of Montana; that upon the purchase of the said shares of capital stock of Teton Co-Operative Reservoir Company the said Bynum Irrigation District and its Board of Commissioners duly apportioned water for irrigation among the lands in the district, as required by law, and in a just and equitable manner, being the water acquired by the purchase of the said stock, and that such water thereupon became, ever since has been and now is appurtenant to such lands and inseparable from the same;

XIV.

That Subdivision 3, Section 7174, Revised Codes of Montana, 1921, as amended by Chapter 157, Laws of Montana, 1923, enumerates certain powers of the Board of Commissioners of Bynum Irrigation District and that the said section, as so amended, is in the words as follows, to-wit:

“The board shall have power and authority to appropriate water in the name of the district, to acquire by purchase, lease, or contract, water and water rights; additional waters and supplies of water, canals, reservoirs, dams and other works already constructed, or in the course of construction, with the privilege, if desired, to contract with the owner, or owners of such canals, reservoirs, dams and other works so purchased and in the course of construction,

for the completion thereof and shall also have power and authority to acquire by purchase, lease, contract, condemnation, or other legal means, lands (and rights [54] in lands) for rights of way, for reservoirs, for the storage of needful waters, and for dam sites, and necessary appurtenances, and such other lands and property as may be necessary for the construction, use, maintenance, repair, improvement, enlargement and operation of any district system of irrigation works.”

XV.

That ever since on or about the year 1925 the said Bynum Irrigation District, as the owner of the aforesaid eight hundred four shares of capital stock, and through its Board of Commissioners, has controlled the said Teton Co-Operative Reservoir Company and its business and affairs, and has operated the said Company for the use and benefit of the said Bynum Irrigation District and the other stockholders of the said Company ;

XVI.

That the lands within Bynum Irrigation District would be arid and dry and of negligible value for agricultural purposes without the water rights acquired by the purchase of the aforesaid capital stock of Teton Co-Operative Reservoir Company and that the value of the said lands without the said water rights would be wholly insufficient to enable the said

Bynum Irrigation District by the assessment of the same to pay the aforesaid bonds or any substantial portion thereof;

XVII.

That on or about the year 1927 the Defendant, Winston Brothers Company, a corporation, acquired from Teton Co-Operative Reservoir Company the latter's promissory note, for a considerable sum of money, representing an indebtedness incurred by the said Teton Co-Operative Reservoir Company in and about the conduct of its corporate business and affairs, and that at the time the said indebtedness was incurred and when the said promissory note was executed and delivered the said Defendant, Winston Brothers Company, then and there well knew that the said Teton Co-Operative Reservoir Company was the instrumentality and agency through and by which the [55] Bynum Irrigation District supplied water for irrigation purposes to the lands in the said district and that the said district had no other means of supplying water to the same; and that the said Winston Brothers Company also then and there knew each and all of the other facts and circumstances hereinbefore set forth and alleged herein;

XVIII.

That thereafter, as more particularly alleged in Plaintiff's complaint herein, the said Winston Brothers Company brought an action upon the

aforesaid promissory note and recovered therein a judgment against the said Teton Co-Operative Reservoir Company, a copy of which said judgment is annexed to the said Plaintiff's complaint and is by reference made a part hereof; that the said judgment has been docketed in the office of the Clerk of the District Court of the Ninth Judicial District of the State of Montana in and for the County of Teton, and that by virtue of the said judgment and of the docketing thereof the said Defendant, Winston Brothers Company, claims a lien upon the real estate of the Teton Co-Operative Reservoir Company necessarily used as aforesaid for the impounding and distribution of waters and for the irrigation of the lands in the said Bynum Irrigation District, and that the said Winston Brothers Company further claims the right, under the said judgment, to levy upon the said real estate by writ of execution and to cause the same to be sold at sheriff's sale and to deprive the said Teton Co-Operative Reservoir Company and the said Bynum Irrigation District of the said property, all of which said property is indispensable, as hereinbefore alleged, to the operation of the said Bynum Irrigation District as a public corporation and to the delivery of waters for irrigation purposes to the lands in the said district;

XIX.

That the aforesaid claims of the said Defendant, Winston Brothers Company, are without right; that

a sale of the said real [56] estate under execution upon the aforesaid judgment would jeopardize and destroy the rights and liens of the Intervenors, James A. Ackroyd, Dwight S. Brigham, Morris F. LaCroix, Earle L. Carter, J. Edward Stevens and Frank E. Nelson, under the aforesaid bonds, and that the said Winston Brothers Company is without right to cause the said real estate, or any part of the same, to be sold under the said judgment or under any writ or writs of execution issued thereon.

Wherefore, the Intervenors, James A. Ackroyd, Dwight S. Brigham, Morris F. LaCroix, Earle L. Carter, J. Edward Stevens and Frank E. Nelson, pray:—

1. That this court declare by its judgment herein, pursuant to the Acts of Congress relating to declaratory judgments, that the said Winston Brothers Company is without right, under its judgment against the said Teton Co-Operative Reservoir Company, or under any writ or writs of execution issued thereon, to sell either at sheriff's sale or otherwise or at all any of the said real estate of the said Teton Co-Operative Reservoir Co., and that the said Winston Brothers Company has no lien under the said judgment upon the said real estate;

2. That they may have further relief based upon this Court's declaratory judgment herein whenever necessary or proper, and also such other and further relief as to the court shall seem meet, just and equitable.

And the said Intervenors further repeat and re-allege the prayer for relief contained in the com-

plaint of Plaintiff filed in the above entitled action, with the same force and effect as if said prayer for relief were herein set forth at length, and further pray that they may have the benefit of any and all proceedings had [57] in the said above entitled action.

R. E. COOKE

FREDRIC MOULTON and

STERLING M. WOOD

By STERLING M. WOOD

Attorneys for James A. Ackroyd, Dwight S. Brigham, Morris F. LaCroix, Earle L. Carter, J. Edward Stevens, and Frank E. Nelson, Intervenors. [58]

State of Montana,
County of Yellowstone—ss.

Sterling M. Wood, of lawful age, being first duly sworn, on his oath deposes and says:

That he is one of the attorneys for the Intervenors, James A. Ackroyd, Dwight S. Brigham, Morris F. LaCroix, Earle L. Carter, J. Edward Stevens and Frank E. Nelson, in the above entitled action and makes this verification in their behalf; that he has read the above and foregoing Bill of Intervention and knows the contents thereof, and that the matters and things therein set forth are true to the best of his knowledge, information and belief.

STERLING M. WOOD.

Subscribed and sworn to before me this 23rd day of February, 1938.

[Notarial Seal] HAZEL BRAINARD,
Notary Public for State of Montana, Residing at
Billings, Montana. My commission expires
April 16, 1939. [59]

EXHIBIT "A"

Number	Dollars
100	1000

United States of
America
State of Montana
County of Teton
BYNUM IRRIGATION DISTRICT
Six Per Cent Gold Bond
First Issue

For Value Received, Bynum Irrigation District, a public corporation of the State of Montana, promises to pay to the bearer, or if this bond is registered, then to the registered holder hereof, the sum of One Thousand Dollars in gold coin of the United States of America, of the present standard of weight and fineness, the First Day of January, 1935, at the Office of the County Treasurer of Teton County, Choteau, Montana, or at The Hanover National Bank of New York City, at the option of the holder, together with the interest thereon from the date hereof at the rate of Six Per Cent Per Annum, payable semi-annually, in like gold coin, on the First

Days of January and July of each year during the period of this bond, upon presentation and surrender of the respective coupons hereto attached as they severally become due and payable.

This Bond is one of a series of 1,000 coupon bonds, numbered consecutively from 1 to 1,000, both inclusive, all being of like tenor, date and effect, except as to the number and date of payment thereof, and all issued under and pursuant to a resolution of the Commissioners of said Bynum Irrigation District, duly and regularly adopted on the twenty-sixth day of June, 1925, and confirmed by the District Court of the Nineteenth Judicial District of the State of Montana, in and for the County of Teton, as provided for by the laws of the State of Montana, and all being a lien upon all the land situated in said Bynum Irrigation District, as provided for by the laws of Montana.

This Bond shall pass by delivery unless it has been registered on the books of the County Treasurer of Teton County, Montana, and may be so registered as to the principal thereof upon application to said Treasurer. Such registration of ownership shall be noted hereon and after such registration of this bond no transfer shall be valid unless it be made on the books of said Treasurer by the registered owner thereof in person, or by attorney duly authorized, and similarly noted hereon. This bond may, however, be discharged from the effect of such registration by being transferred on said books to

the bearer and thereafter transferability by delivery shall be restored. It may, however, from time to time be again transferred to bearer as before. Such registration shall not, however, affect the negotiability of the coupons, which shall always be transferable by delivery merely.

This Bond shall not become valid until authenticated by the signatures of the President and Secretary of Bynum Irrigation District. The interest coupons attached to this bond may be authenticated by the engraved facsimile signatures of its President and Secretary. [60]

In Witness Whereof, said Bynum Irrigation District has caused this bond to be signed by the President and attested by the Secretary of its Board of Commissioners under its corporate seal, and in addition thereto has caused the interest coupons hereunto attached to be executed by the facsimile signatures of its President and Secretary, this first day of July, 1925.

W. D. JONES,
President.

Attest:
E. B. NOBLE,
Secretary.

(Reverse Side of Bond)

ENDORSEMENTS.

State of Montana,
County of Teton—ss.

We, the undersigned, do hereby severally certify that we have made and kept a record of the within bond in our respective offices pursuant to law.

E. B. NOBLE,
Secretary Bynum Irrigation
District

OTTO WAGNILD,
Treasurer Teton County,
Montana.

—————
Name of Registered

Date Owner Signature

.....
.....
.....

Helena, Montana, July 1, 1925.

C. G. Stewart, Secretary of State of the State of Montana, do hereby certify that the within bond No. 100, of issue No. One, of Bynum Irrigation District, issued July 1, 1925, is in accordance with an Act of the Legislature of Montana approved March 5, 1921, a legal investment for all trust funds, and for the funds of all Insurance Companies, Banks, both commercial and savings, Trust Companies, state

school funds, and any funds which may be invested in county, municipal or school district bonds, and it may be deposited as security for the performance of any act whenever the bonds of any county, city, city and county, or school district may be so deposited, it being entitled to such privileges by virtue of an examination by the State Engineer, the Attorney General and State Examiner of the State of Montana, in pursuance of said Act. The within bond may [61] also, according to the Constitution of the State of Montana, be used as security for the deposit of public money in banks in said State.

C. G. STEWART,

Secretary of State of the State
of Montana.

State of Montana,
County of Teton—ss.

In the District Court of the Nineteenth Judicial District in and for the County of Teton.

The issuance of this bond, and of the other bonds of the issue of which this bond is one, has been ratified, approved and confirmed by the decree of the said District Court.

Witness my hand and seal of said Court this 10th day of September, A. D. 1925.

[Seal]

BLANCHE M. JACOBSON,

Clerk of the District Court of
Teton County, Montana.

By MEDA McLEAN,
Deputy Clerk.

[Endorsed]: Filed Mar. 11th, 1938. C. R. Garlow,
Clerk. [62]

Thereafter, on March 22, 1938, a Motion to Dismiss Bill of Intervention of James A. Ackroyd, et al., was duly filed herein, being in the words and figures following, towit: [63]

[Title of District Court and Cause.]

MOTION TO DISMISS BILL OF INTERVENTION OF JAMES A. ACKROYD, ET. AL.

Comes Now the defendant, Winston Brothers Company, a corporation, whose correct corporate name is Winston Bros. Company, a corporation, and files this motion and hereby moves the court to dismiss the above-entitled action as to this defendant and to dismiss the bill of intervention of James A. Ackroyd, Dwight S. Brigham, Morris F. LaCroix, Earle L. Carter, J. Edward Stevens and Frank E. Nelson, on file in this action, as to this defendant, upon the ground and for the reason that said Bill of Intervention does not state facts sufficient to constitute a cause of action against this defendant, or to entitle said intervenors to the relief sought, or [64] any relief, against this defendant.

Wherefore, defendant prays that said action and said Bill of Intervention of James A. Ackroyd, Dwight S. Brigham, Morris F. LaCroix, Earle L. Carter, J. Edward Stevens and Frank E. Nelson, and said suit in equity, be dismissed as to this defendant and that this defendant have and recover against the Intervenors above named for its costs incurred herein.

Dated this 22nd day of March, 1938.

R. H. GLOVER,
S. B. CHASE, JR.,
JOHN D. STEPHENSON,
Solicitors for Defendant,
Winston Brothers Company,
410-First National Bank
Bldg.,
Great Falls, Montana.

[Endorsed]: Filed March 22, 1938. C. R. Garlow,
Clerk. [65]

Thereafter, on February 13, 1939, the Decision of the Court was duly filed herein, being in the words and figures following, towit: [66]

[Title of District Court and Cause.]

DECISION.

The complaint in above cause was filed therein pursuant to the Declaratory Judgment Act, 28 U. S. C. A. 400. In the beginning Brady Irrigation Company, a corporation, was plaintiff, and Winston Brothers Company, a corporation, Teton Co-Operative Reservoir Company, a corporation, and Bynum Irrigation District, a public corporation, were defendants. C. K. Malone alleges ownership of ten of the bonds of the Bynum Irrigation District in his complaint in intervention, and James A. Ackroyd and five other persons allege that they are the own-

ers and holders of nine hundred twenty-three of the bonds of Bynum Irrigation District in their complaint in intervention, and that there are in all 1000 bonds of the par value of one million dollars. Three motions by Winston Brothers Company are pending seeking the dismissal of the complaints of plaintiff and Malone, intervenor and the Bill of Ackroyd, et al, as to this defendant. The grounds alleged in all three motions are that the complaints fail to state facts sufficient to constitute a cause of action against the defendant, Winston Brothers Company. This matter comes before the court under Rule 40 (2) and briefs have been submitted on the motions by counsel for the respective parties, plaintiff, defendant and intervenors, Ackroyd, et al. [67]

According to the briefs the defendant seems to be satisfied, generally speaking, with plaintiff's statement of facts, which alleges, among other things, that plaintiff is a corporation organized and operating solely for the purpose of delivering water for irrigation and domestic purposes to its stockholders and has been operated only as a co-operative association and not for profit; that the defendant, Teton Co-operative Reservoir Company is a corporation and ever since its organization has been operated solely and only for the purpose of delivering water for irrigation and domestic purposes particularly for the irrigation of lands owned or controlled by the stockholders of the same, and that it has never operated for profit, and that the

only income it has ever received has been from sale of its capital stock and from assessments levied against the same; that it has a capital stock of one thousand shares of the par value of \$150.00, 804 of which are owned by Bynum Irrigation District, a public corporation, and 156 shares owned by the plaintiff, and the other 40 shares by other stockholders. The Reservoir Company owns property consisting of about 577.81 acres of land situated in Teton County, Montana; that the land is necessary for use by the Reservoir Company for purposes of reservoir, dam and other irrigation works which are needed for diverting, conveying storing and distributing water to stockholders of the Reservoir Company to irrigate the lands of such stockholders, and the stockholders of plaintiff and members of the Bynum Irrigation District.

In 1930 defendant, Winston Brothers Company obtained a judgment in the state court of Teton County, Montana, against the Reservoir Company on a promissory note made by the Reservoir Company to this defendant, dated July 23, 1927, and that by reason of such judgment the defendant claims a lien against the property of the Reservoir Company and unless restrained by an order of this court will cause an execution to issue for the enforcement of the judgment by sale of the lands, reservoir site and other property of the Reservoir Company. The principal question therefore is, whether the defendant, Winston Brothers Company, has a lien upon the [68]

said property, and whether it is subject to sale under a writ of execution for the enforcement of the judgment. The theory of plaintiff is that the use of the water diverted, stored and distributed by the Reservoir Company and its irrigation works are appurtenant to the lands which are irrigated by such water, and that since all of the lands of the Reservoir Company are necessary for the diversion, storage and distribution of such waters that they can not be sold under execution.

The theory of the intervenors, Ackroyd, et al, is that the Reservoir Company is not operated for profit and has no beneficial interest in the real estate it owns; that the real estate, and the appurtenances, are used only to provide water for irrigation purposes to the stockholders of the company at the cost of the service, each share of stock representing the right to a proportionate part of the water rights involved; that the Bynum Irrigation District is a public corporation and is the owner of 80.4% of the stock of the Reservoir Company—thus controlling its business; that the Reservoir Company is but a trustee holding a naked legal title to the water facilities and the entire beneficial interest therein is vested in its stockholders, which include the Bynum Irrigation District holding 80.4% of the outstanding stock; therefore, the Bynum Irrigation District is a cestui que trust of the trust of which the Reservoir Company is trustee. That since the real estate of the Reservoir Company

belongs to the Bynum Irrigation District, a public corporation, for reasons of public policy it would be exempt from execution. The title to 577.81 acres of land is in the Reservoir Company, together with a government reservoir site, canals, ditches and water rights. Section 9410 of Revised Codes of Montana of 1935 provides that from the time the judgment is docketed it becomes a lien upon all real property of the judgment debtor not exempt from execution in the county, owned by him at the time, or which he may afterward acquire, until the lien ceases, which may continue for six years, unless the judgment is previously satisfied.

Another reference to the question, whether the property is subject to execution is found in Sec. 9424 R. C. M. 1935; and is as follows: "What shall be liable on execution—not affected until levy. All goods, chattels, moneys and other property, both real and personal, or any interest therein of the judgment debtor, not exempt by law, and all [69] property and rights of property, seized and held under attachment in the action, are liable to execution". The next question confronting the court is whether such property as that involved in this action is exempt from execution. The statutory provisions in respect to exemptions are found in Sections 9427 to 9430, 2 R. C. M. 1935. Counsel contend that the only exemption that might apply is found in Sec. 9428, subdivision 10, exempting "all court houses, jails, public offices, and buildings,

lots, grounds, and personal property, the fixtures, furniture, books, papers, and appurtenances belonging and pertaining to the court house, jail, and public offices belonging to any county of this state, and all cemeteries, public squares, parks, and places, public buildings, town halls, public markets, buildings for use of fire departments and military organizations, and the lots and grounds thereto belonging and appertaining, owned or held by any town or incorporated city, or dedicated by such city or town to health, ornament, or public use, or for the use of any fire or military company organized under the laws of the State. No article, however, or species of property mentioned in this section is exempt from execution issued upon a judgment recovered for its price, or upon a judgment of foreclosure of a mortgage lien thereon, and no person not a bona fide resident of this state shall have the benefit of these exemptions. No person can claim more than one of the exemptions mentioned in the first six subdivisions of this section."

Directly preceding the above subdivision 10 appears the following introductory paragraph: "Specific exemptions. In Addition to the property mentioned in the preceding section, there shall be exempt to all judgment debtors who are married, or who are heads of families, the following property:" This paragraph seems to have but very little if any application to subdivision 10, which deals almost

entirely with public buildings and grounds. It is not apparent how the lands and works of the Reservoir Company could be exempt under the provisions of the above mentioned statute. The claim is made that the property of the Reservoir Company is appurtenant to the lands of the stockholders of the Brady Irrigation Company and to the [70] lands within the Bynum Irrigation District. But the exemption statute would not seem to apply for the apparent reason that it does not deal with the kind of property here involved. Considerable stress is placed upon the assertion that the Reservoir Company does not operate for profit; there seems to be no reason on that account alone why that company should be excused from payment. It appears that the work done by defendant Winston Brothers was for the enlargement and improvement of the reservoir of the former company and probably enhanced its value and increased the water supply. The defendant recovered a judgment on a promissory note given by the Reservoir Company for the price of these improvements and the debtor company refused payment of the balance due. If the exemption statute itself does not declare that where a judgment is obtained under such circumstances the defendant's property shall not be exempt from sale under execution, it is difficult to draw the line of demarkation. The statute says that "no article, however, or species of property mentioned in this section is exempt from execution issued upon a

judgment recovered for its price * * *". This was a judgment for the price of necessary additions to and improvements of the property of the debtor company. Even though the statute should be held to apply the foregoing provision would seem to raise a serious question whether it would be available to the Reservoir Company.

But there are other questions to be considered in order to determine whether Winston Brothers should be allowed to proceed under their judgment. A declaratory judgment is sought, to the effect that the judgment of Winston Brothers Company is not a lien upon the lands and premises of the Reservoir Company, and that they should be enjoined from claiming a lien or attempting to sell the property on execution. The theory is advanced in intervenor's brief that the real estate of the Reservoir company in fact belongs to Bynum Irrigation District, a public corporation, and therefore for reasons of public policy would be exempt from execution. In respect to the Reservoir Company there is nothing novel or unusual in its incorporation, organization or operation. While it may not be conducted for profit it ascertains the cost of operation and assesses its stockholders accordingly. If there should be a saving in the course of its operations [71] at any time would it not inure to the benefit of the stockholders. From time to time

repairs and improvements would be necessary and expense would have to be incurred and arrangements made for payment. Of course, they would expect to pay; they would not want to defeat an honest obligation by claiming that they had a mere naked title to the property, and that the water they stored belonged to someone else and the works as well; and that because one irrigation company owned eighty per cent of its (the Reservoir Company's) stock, and was a public corporation, that that thereby rendered it execution proof for reasons of public policy.

It appears that the Reservoir Company did not sell any land to the purchasers of its shares of stock, and under its by-laws the right to use the water was evidently a personal right and not limited to any specific land. The Brady Company owns no land but does own shares of stock in the Reservoir Company, and its (the Brady Company's) stockholders own land but no shares in the Reservoir Company. The right to the use of water by the stockholders of the Brady Company rests upon the ownership of stock by the Brady Company in the Reservoir Company, subject to such rules and regulations as may be adopted. The particular facts of the case will determine whether a water right is appurtenant to land as governed by Montana decisions. The court held in *Maclay v. Missoula Irrigation District*, 90 Mont. 344, 3 Pac. (2) 286: "The law on the subject of when water rights are

appurtenant to land and on the right to effect a severance is well established in this state. A water right, legally acquired, is in the nature of an easement in gross, which, according to circumstances, may or may not be an easement annexed or attached to certain lands as an appurtenance thereto. (*Smith v. Denniff*, 24 Mont. 20, 81 Am. St. Rep. 408, 50 L. R. A. 741, 60 Pac. 398). When a water right is acquired by appropriation and used for a beneficial and necessary purpose in connection with a given tract of land, it is an appurtenance thereto, and, as such, passes with the conveyance of the land, unless expressly reserved from the grant. (*Lensing v. Day & Hensen Co.*, 67 Mont. 382, 215 Pac. 999). This is so even though the grant does not specifically mention the water right. [72] (*Yellowstone Valley Co., v. Associated Mortgage Investors*, 88 Mont. 73, 70 A. L. R. 1002, 290 Pac. 255). Such a right may, however, be disposed of apart from the land to which it is appurtenant (*Lensing v. Day & Hensen Co.*, above), and may be reserved from a grant of the land (*Kofoed v. Bray*, 69 Mont. 78, 220 Pac. 532)."

One who asserts that a water right and ditch are appurtenant to certain lands has the burden of proving it, and must connect himself with the title of the prior appropriator (*Smith v. Denniff*, 24 Mont. 20). One could purchase stock from a stockholder of the Brady Company and use it wherever he desired without regard to the use of water by the other stockholders; the stock of this

company could be transferred without the land; the sale of the land would not carry with it any stock of the above company unless so specified in the deed. If it were possible to hold that the stockholder's interest in the Brady Company is in effect an interest of a stockholder in the Reservoir Company, and that such interest gives the stockholder of Brady Company an interest in the water rights owned by the Reservoir Company, and that therefore such water right is appurtenant to the land of the Brady Company's stockholder and gives such stockholder title to the lands and works of the Reservoir Company, and that consequently the latter company holds only a naked legal title, then, under such circumstances, the theory of the plaintiff and intervener in substance at least, might have to be adopted.

The definition of appurtenance is given in *Smith v. Denniff*, *Supra*, at page 23, as follows: "Section 1078 of the Civil Code (Section 6671 R. C. M. 1935) defines an 'appurtenance' as follows: 'A thing is deemed to be incidental or appurtenant to land when it is by right used with the land for its benefit, as in the case of a way, or water course, or of a passage for light, air or heat from or across the land of another'. A 'water course from or across the land of another' is an easement, and by reference to section 1250 of the Civil Code (Section 6749 R. C. M. 1935) it is plain that in the contemplation of the Code an appurtenance to land is in any and every case an easement.'"

This definition of the writer of the above decision is interestingly illustrated on pages 23 et seq. The court further held in the above case [73] on page 27: "Nor can it (the servitude upon the land across which his water is conveyed) be technically an appurtenance to the land upon which it exists, for, as we have seen, a burden or servitude, to be appurtenant to the land, must be a burden or servitude upon other land." Even though it should appear that the Brady Company's stockholders have an easement in the ditches of the Reservoir Company, would that circumstance render the property of the latter company immune from the lien of a judgment or sale on execution. Reference has been made to the case of Yellowstone Valley Company v. Associated Mortgage Investors, 88 Mont. 73, 290 Pac. 255, wherein appears an able opinion written by Chief Justice Callaway, which has been carefully considered by this court because of the reliance placed upon it by counsel for plaintiff. It is plain to be seen that the court in that case was dealing with an entirely different state of facts although the deductions might appear to have some bearing on the instant case. The court there held that under the facts shown the mortgage included the water rights represented by the shares of stock, which had been specifically enumerated and included therein, and further held: "we do not overlook the point that whether a water right evidenced by shares of stock is appurtenant to the land upon which the water is used is a question of fact. But,

upon the conceded facts, that question does not trouble us; clearly, the water is appurtenant to the land." It seems hardly possible to find from the language of the foregoing decision that the court intended the inference to be drawn that a stockholder in the Yellowstone Valley Company was an owner of an interest in the property of the company, and that this interest was appurtenant to the land which is irrigated.

Contrary to the theory of plaintiff it clearly appears from the cases cited by defendant, viz: *Hyink v. Low Line Irrigation Company*, 62 Mont. 401, and *Dyk v. Buell Land Co.*, 70 Mont. 557, 227 Pac. 71, that a property interest has been shown to exist in the Reservoir Company and that this company cannot be held to possess merely a naked legal title under the Montana decisions.

Much stress has been placed upon the by-laws of the Reservoir Company as to its character as a corporation for profit, or otherwise: [74] as to that, the articles of incorporation would seem to be the best evidence, but they are not attached to the complaint as an exhibit, and nothing appears therein to indicate anything else than an ordinary corporation for profit. In *Canyon Creek Irr. Dist. vs. Martin*, 52 Mont. 339; 159 Pac. 418, after showing the stock had a commercial value, as in the case of the Reservoir Company, and the corporate purposes, the court held on page 344; "This fixes and determines the character of the reservoir company; in it

there is nothing suggestive of mutuality, nothing to indicate that the functions of the corporation are confined to the carriage of water to its members so as to make them, and not the corporation, the owners of its ostensible assets. If it be supposed, however, that this is made to appear from the by-laws offered but not received in evidence, the answer is that not in this way can the essential nature of the corporation be affected." Other cases relied upon by plaintiff are *Gue v. The Tide Water Canal Company*, 65 U. S. 257, 16 L. Ed. 635, and *Eldredge v. Mill Ditch Company*, 177 Pac. 939 (Ore.); the latter case is also cited by interveners *Ackroyd, et al.* The court has read these cases, bearing in mind the application made by counsel for both sides in this controversy, and is inclined to believe that neither of them is applicable to the facts of the present case; the reasoning found in defendant's brief in opposition to the application of these two cases as an authoritative guide appears to be correct. The principal ground of distinction between the *Eldredge* case and the present case is that the stockholders of the Reservoir Company do not own any land; the stock being held by the Brady Irrigation Company and the Bynum Irrigation District. The interveners are bondholders of Bynum Irrigation District, and the bonds appear to be a lien upon all of the land situated in that district; from the complaint in intervention it does not appear that any of the land of the Reservoir Company is in the Bynum Irrigation District.

There are no cases cited showing that a person who is not the owner of a water right can obtain an easement in a ditch for the conveyance of water for irrigation. The water right owner in the immediate case is the Reservoir Company and the rights of plaintiff and the Bynum Irrigation District are governed by contract with the Reservoir Company. [75]

This case presents rather a difficult situation for all concerned, and the difficulty is not likely to end with this decision, but the court has endeavored to keep in view the way to substantial justice. Of course, the best way out is to make arrangement for the payment of the judgment. It is quite evident that all who are using water from this reservoir are deriving benefit from the improvements made by defendant, in fact they are the chief beneficiaries.

The court has considered the pleadings, arguments of counsel for the respective parties, the constitution and statutes referred to, and many authorities, and being duly advised and good cause appearing therefor, is now of the opinion that the application for injunctive relief should be denied and that the three motions to dismiss should be granted and it is so ordered.

CHARLES N. PRAY

Judge.

[Endorsed] Filed Feb. 13, 1939. C. R. Garlow, Clerk. C. G. Kegel, Deputy Clerk. [76]

Thereafter, on April 14, 1939, Judgment of Dismissal was duly filed and entered herein, being in the words and figures following, to wit: [77]

In the District Court of the United States in and for the District of Montana.—Great Falls Division.

JAMES A. ACKROYD, DWIGHT S. BRIGHAM,
MORRIS F. LaCROIX, EARLE L. CARTER,
J. EDWARD STEVENS and FRANK E.
NELSON,

Interveners,

vs.

BRADY IRRIGATION COMPANY, a corporation,
tion,

Plaintiff,

and

WINSTON BROTHERS COMPANY, a corporation,
TETON CO-OPERATIVE RESERVOIR COMPANY, a corporation, and BY-
NUM IRRIGATION DISTRICT, a public corporation,

Defendants,

and

C. K. MALONE,

Intervenor.

Respondents.

JUDGMENT OF DISMISSAL.

The decision of the court having been filed with the Clerk of Court on February 13, 1939, denying the application for injunctive relief and ordering dismissed the complaint and the two complaints in intervention, hereinafter more fully described, and

It appearing to the court that notice of the entry of said decision and order was given to the plaintiff and to all the intervenors, hereinafter mentioned, and that more than ten (10) days has elapsed since said notice was so given, and that neither the plaintiff nor any of said intervenors have filed any amended pleadings whatsoever. [78]

Now therefore, on motion of the defendant, Winston Brothers Company, a corporation, it is hereby ordered, adjudged and decreed that the complaint of plaintiff, Brady Irrigation Company, a corporation, the complaint in intervention of the intervenor, C. K. Malone, and the bill of intervention of the intervenors, James A. Ackroyd, Dwight S. Brigham, Morris F. LaCroix, Earle L. Carter, J. Edward Stevens and Frank E. Nelson, be and each of them is hereby fully and finally dismissed and that judgment of dismissal as to each of them be entered, and the defendant, Winston Brothers Company, have and recover as against said plaintiff and all of said intervenors, its costs herein which are hereby taxed and allowed at the sum of \$10.00.

Given and made this 14 day of April, 1939.

CHARLES N. PRAY

Judge.

[Endorsed]: Filed and entered April 14, 1939.
C. R. Garlow, Clerk. [79]

Thereafter, on July 8, 1939, Notice of Appeal was duly filed herein by James A. Ackroyd, et al., Interveners, being in the words and figures following, to wit: [80]

[Title of District Court and Cause.]

NOTICE OF APPEAL

To C. R. Garlow, Clerk of the above named Court, and to the parties to the above entitled action and their attorneys:

Notice is hereby given that James A. Ackroyd, Dwight S. Brigham, Morris F. LaCroix, Earle L. Carter, J. Edward Stevens, and Frank E. Nelson, Interveners above-named, hereby appeal to the Circuit Court of Appeals for the Ninth Circuit from the final judgment of the court herein, entered in the above entitled action on April 14th, 1939.

This appeal is taken from the whole and every part of the judgment above described. [81]

Dated this 8th day of July, A. D. 1939.

STERLING M. WOOD

R. E. COOKE

FREDRIC MOULTON

By STERLING M. WOOD

Attorneys for Interveners,

Ackroyd, et al.

Securities Building,

Billings, Montana.

[Endorsed]: Filed July 8, 1939. C. R. Garlow, Clerk. [82]

Thereafter, on July 8, 1939, Cost Bond on Appeal was duly filed herein by James A. Ackroyd, et al., Interveners, being in the words and figures following, to wit: [83]

[Title of District Court and Cause.]

COST BOND ON APPEAL

Know all men by these presents:

That we, James A. Ackroyd, Dwight S. Brigham, Morris F. LaCroix, Earle L. Carter, J. Edward Stevens, and Frank E. Nelson, as Principals, and the Massachusetts Bonding and Insurance Company, a corporation, as Surety are held and firmly bound unto Winston Brothers Company, a corporation, in the full and just sum of Two Hundred Fifty Dollars (\$250) to be paid to the said Winston Brothers Company, a corporation, to which payment well and truly to be made we bind ourselves, our successors and assigns, jointly and severally, by these presents.

Sealed with our seals this 7th day of July in the Year of [84] Our Lord 1939.

Whereas, lately in the above entitled action a judgment was rendered against the Interveners, James A. Ackroyd, Dwight S. Brigham, Morris F. LaCroix, Earle L. Carter, J. Edward Stevens, and Frank E. Nelson, therein, and the said Interveners are about to appeal, to the United States Circuit Court of Appeals for the Ninth Circuit, from the said judgment, and the whole thereof, to reverse the said judgment;

Now, Therefore, the condition of the above obligation is such that if the above named Interveners shall pay all costs, if the said appeal is dismissed or judgment affirmed, or shall pay such costs as the appellate court may award if the said judgment is modified, then the above obligation to be void; else to remain in full force and virtue.

In accordance with Rule 90 of the Rules of the above named District Court of the United States for the District of Montana, the said Massachusetts Bonding and Insurance Company, a corporation, the surety herein, expressly agrees that in case of a breach of any condition of this bond that the above named court, upon notice to the said surety of not less than ten days, may proceed summarily in the above entitled action in which this bond is being given, to ascertain the amount which the said surety is bound to pay on account of such breach, and render judgment therefor against the said surety, and award execution therefor.

JAMES A. ACKROYD,
DWIGHT S. BRIGHAM,
MORRIS F. LaCROIX,
EARLE L. CARTER,
J. EDWARD STEVENS and
FRANK E. NELSON

By STERLING M. WOOD

Their Atty in Fact.

MASSACHUSETTS BONDING AND
INSURANCE COMPANY,
a corporation,

By ROBERT A. NATHAN, JR.

Its Atty. in Fact

[Seal]

[Endorsed]: Filed July 8, 1939. C. R. Garlow,
Clerk. [85]

Thereafter, on July 11, 1939, Notice of Appeal was duly filed herein by Brady Irrigation Company, being in the words and figures following, to wit: [86]

[Title of District Court and Cause.]

NOTICE OF APPEAL TO THE CIRCUIT
COURT OF APPEALS

Notice is hereby given:

That Brady Irrigation Company, plaintiff above named, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit from the final judgment entered in this action on the 14th day of April, 1939.

Dated this 11 day of July, A. D. 1939.

I. W. CHURCH

ART JARDINE

J. W. FREEMAN

J. N. THELEN

J. P. FREEMAN

ERNEST ABEL

By ERNEST ABEL

Attorneys for Plaintiff

[Endorsed]: Filed July 11, 1939. C. R. Garlow,
Clerk. [87]

Thereafter, on July 11, 1939, Bond on Appeal was duly filed herein by Brady Irrigation Company, a corporation, being in the words and figures following, to wit: [88]

[Title of District Court and Cause.]

BOND ON APPEAL.

Know All Men by These Presents:

That National Surety Corporation, a corporation created and existing under the laws of the State of New York, and authorized to and doing business in the State of Montana, as a surety corporation, is held and firmly bound unto the above named defendant, Winston Brothers Company, a corporation, in the sum of Two Hundred Fifty and no/100 Dollars, \$250.00, to be paid to the said Winston Brothers Company, a corporation, for the payment of which, well and truly to be made, it binds itself, its successors and assigns firmly by these presents.

Whereas, the above named Brady Irrigation Company, a corporation, has prosecuted an appeal, or is about to prosecute an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, to reverse the Judgment rendered in the above entitled suit, by the Judge of the District Court of the United States, in and for the District of Montana;

[89]

Now, therefore, the undersigned, the National Surety Corporation, in consideration of the premises and of said appeal, does hereby undertake in the sum of Two Hundred Fifty and no/100 Dollars (\$250.00) and promises to the effect that if the said plaintiff, Brady Irrigation Company, a corporation, shall pay all costs if the appeal is dismissed or the

judgment affirmed, and all such costs as the said Circuit Court of Appeals may award if said judgment is modified, then this obligation shall be void, otherwise the same shall be and remain in full force and virtue.

Dated this 11th day of July, 1939.

NATIONAL SURETY CORPORATION,
 [Seal] By W. S. FRARY,
 Attorney in Fact.

[Endorsed]: Filed July 11, 1939. C. R. Garlow,
 Clerk. [90]

Thereafter, on July 11, 1939, copies of notices of appeal were duly mailed to counsel herein, the docket record of such mailing of notices being in the words and figures following, towit: [91]

[Title of District Court and Cause.]

DOCKET ENTRIES:

July 11, 1939.

Mailed Copy notice of appeal of James A. Ackroyd, et al, to Freeman, Thelen & Freeman, Great Falls, Montana,; George Coffey, Choteau, Montana; and Cooper, Stephenson & Glover, Great Falls, Montana, attorneys.

July 11, 1939.

Mailed copy notice of appeal of Brady Irrigation District to Wood & Cook, Billings, Montana; George Coffey, Choteau, Montana; and Cooper, Stephenson & Glover, Great Falls, Montana, attorneys. [92]

Thereafter, on July 12, 1939, Stipulation as to Record on Appeal was duly filed herein, being in the words and figures following, towit: [93]

[Title of District Court and Cause.]

STIPULATION AS TO RECORD ON APPEAL

It Is Hereby Stipulated, by and between the attorneys for the respective parties to the above entitled action, as follows, to-wit:

I.

That this stipulation is made under Rule 75(f) of the Rules of Civil Procedure for the District Courts of the United States and in lieu of a designation under Rule 75(a) of said Rules of the contents of the record on appeal in the above en- [94] titled action;

II.

That the parts of the record to be included in the above entitled action on the appeal of said action to the United States Circuit Court of Appeals for the Ninth Circuit, shall be as follows, to-wit:

A. Complaint and petition for declaratory judgment of Plaintiff, Brady Irrigation Company, a corporation;

B. Motion of Defendant, Winston Brothers Company, a corporation, to dismiss bill of complaint;

C. Complaint in Intervention of C. K. Malone;

D. Motion of Defendant, Winston Brothers Company, a corporation, to dismiss complaint in intervention of C. K. Malone;

E. Bill of Intervention of James A. Ackroyd, Dwight S. Brigham, Morris F. LaCroix, Earle L. Carter, J. Edward Stevens and Frank E. Nelson;

F. Motion of Defendant, Winston Brothers Company, a corporation, to dismiss bill of intervention of James A. Ackroyd, Dwight S. Brigham, Morris F. LaCroix, Earle L. Carter, J. Edward Stevens and Frank E. Nelson;

G. Order granting James A. Ackroyd, Dwight S. Brigham, Morris F. LaCroix, Earle L. Carter, J. Edward Stevens and Frank E. Nelson leave to intervene;

H. Order and decision of Judge Pray of February 13th, 1939, granting motions to dismiss;

I. Judgment of dismissal of April 14th, 1939;

J. Notice of Appeal of James A. Ackroyd, Dwight S. Brigham, Morris F. LaCroix, Earle L. Carter, J. Edward Stevens and Frank E. Nelson filed July 8th, 1939, together with portions of the clerk's civil docket designating the names of the persons to whom copies of the notices of [95] appeal were mailed with date of mailing;

K. Cost bond on appeal filed in connection with the notice of appeal designated in the last preceding paragraph hereof;

L. Notice of Appeal of Plaintiff, Brady Irrigation Company, a corporation, filed July 11th, 1939, together with portions of the clerk's civil docket designating the names of the persons to whom copies of the notices of appeal were mailed with date of mailing;

M. Cost bond on appeal filed in connection with the notice of appeal designated in the last preceding paragraph hereof.

N. A copy of this Stipulation.

Dated this 11th day of July, A. D. 1939.

I. W. CHURCH
ART JARDINE
J. W. FREEMAN
J. N. THELEN
J. P. FREEMAN
ERNEST ABEL

By ERNEST ABEL,

Attorneys for Plaintiff.

STERLING M. WOOD
R. E. COOKE
FREDERIC MOULTON

By STERLING M. WOOD

Attorneys for Interveners, James A. Ackroyd, Dwight S. Brigham, Morris F. LaCroix, Earle L. Carter, J. Edward Stevens and Frank E. Nelson.

R. H. GLOVER
S. B. CHASE, JR.
JOHN D. STEPHENSON

By S. B. CHASE, JR.

Attorneys for Defendant, Winston Brothers Company, a corporation.

[Endorsed]: Filed July 12, 1939. C. R. Garlow, Clerk. [96]

In the District Court of the United States in
and for the District of Montana, Great Falls
Division

United States of America,
District of Montana—ss.

I, C. R. Garlow, Clerk of the District Court of the United States for the District of Montana, do hereby certify to the Honorable, The United States Circuit Court of Appeals for the Ninth Circuit, that the foregoing volume consisting of 97 pages, numbered consecutively from 1 to 97 inclusive, is a full, true and correct transcript of all matter designated by the parties as the record on appeal in case No. 3053, Brady Irrigation Company vs. Winston Bros. Company, et al., as appears from the original records and files of said court in my custody as such Clerk.

I further certify that the costs of said transcript amount to the sum of Twenty-two and 80/100 Dollars (\$22.80), and have been paid by the appellant.

Witness my hand and the seal of said court at Great Falls, Montana, this 28th day of July, 1939.

C. R. GARLOW,

Clerk as aforesaid.

By C. G. KEGEL,

Deputy.

[Seal] [97]

[Endorsed]: No. 9251. United States Circuit Court of Appeals for the Ninth Circuit. James A. Ackroyd, Dwight S. Brigham, Morris F. LaCroix, Earle L. Carter, J. Edward Stevens, and Frank E. Nelson, Appellants, vs. Winston Brothers Company, a corporation, Appellee, and Brady Irrigation Company, a corporation, Appellant, vs. Winston Brothers Company, a corporation, Appellee. Transcript of Record Upon Appeals from the District Court of the United States for the District of Montana.

Filed July 31, 1939.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

In the United States Circuit Court of Appeals for
the Ninth Circuit.

No. 9251.

JAMES A. ACKROYD, DWIGHT S. BRIGHAM,
MORRIS F. LACROIX, EARLE L. CARTER,
J. EDWARD STEVENS and FRANK E.
NELSON,

Intervenors,

vs.

BRADY IRRIGATION COMPANY,
a corporation,

Plaintiff,

and

WINSTON BROTHERS COMPANY, a corpora-
tion, TETON CO-OPERATIVE RESER-
VOIR COMPANY, a corporation, and
BYNUM IRRIGATION DISTRICT, a pub-
lic corporation,

Defendants.

and

C. K. MALONE,

Intervenor,
Respondents.

STATEMENT OF THE POINTS ON WHICH
APPELLANT, BRADY IRRIGATION
COMPANY, INTENDS TO RELY, AND OF
THE PARTS OF THE RECORD WHICH
SAID APPELLANT THINKS NECES-
SARY FOR THE CONSIDERATION
THEREOF.

The appellant, Brady Irrigation Company, intends to rely upon the contentions that the District Court erred:

1. In granting the Motion of the defendant, Winston Brothers Company, a corporation, to dismiss the plaintiff's Complaint and Petition for a Declaratory Judgment upon the following grounds, to-wit:

a. That the plaintiff was entitled to a Judgment declaring the rights of the parties to the lands and premises, the legal title to which is held by Teton Cooperative Reservoir Company, which are necessary for irrigation purposes.

b. That the plaintiff has an easement in and to the lands necessary for irrigation purposes, the title to which is held by Teton Cooperative Reservoir Company, for the purpose of storing, diverting and carrying water for irrigation purposes to the lands of the stockholders of said plaintiff corporation, and that such easement is appurtenant to the lands irrigated with such waters.

c. That the plaintiff has an interest in the lands necessary for irrigation purposes, the title to which is held by Teton Cooperative Reservoir Company.

2. In Dismissing the plaintiff's Complaint and Petition for Declaratory Judgment.

3. In rendering Judgment dismissing the plaintiff's Complaint and Petition for Declaratory Judgment.

4. In holding that the appellant, Brady Irrigation Company, was not entitled to a Judgment, declaring the rights and easements of said Brady Irri-

gation Company, by reason of its ownership of one hundred fifty-six (156) shares of the capital stock of Teton Cooperative Reservoir Company, in and to the property used for irrigation purposes, the legal title to which is held by Teton Cooperative Reservoir Company.

5. In failing to hold that the appellant, Brady Irrigation Company, was entitled to a Judgment declaring the rights of said Brady Irrigation Company, by reason of its ownership of 156 shares of the capital stock of Teton Cooperative Reservoir Company, in and to the property used for irrigation purposes, the legal title to which is held by Teton Cooperative Reservoir Company.

6. In holding that the Appellee, Winston Brothers Company, a corporation, has a lien enforceable by a Writ of Execution and Sale against the property necessary and used for irrigation purposes, the legal title to which is held by Teton Cooperative Reservoir Company.

7. In refusing to declare the rights of the appellant, Brady Irrigation Company, in and to the land necessary and used for irrigation purposes, the title to which is held by Teton Cooperative Reservoir Company.

8. In holding that the Judgment of the appellee, Winston Brothers Company, a corporation, is a lien enforceable by a Writ of Execution and Sale against the property which is necessary and is used for irrigation purposes, the legal title to which is held by Teton Cooperative Reservoir Company.

9. In failing to hold that the appellant, Brady Irrigation Company, was not entitled to a Judgment declaring that any lien which the appellee, Winston Brothers Company, a corporation, may have against the land described in the Complaint and held by Teton Cooperative Reservoir Company, is subject to an easement of the appellant, Brady Irrigation Company, for the purpose of diverting, storing and carrying water for irrigation purposes on and across said land.

10. In holding that the plaintiff, Brady Irrigation Company, a corporation, was not entitled to an injunction restraining a sale under a Writ of Execution, of the property necessary and used for irrigation purposes, the legal title to which stands in the name of Teton Cooperative Reservoir Company.

11. In holding that the appellant, Brady Irrigation Company, does not have an easement in and to the lands necessary for irrigation purposes, the legal title to which is held by Teton Cooperative Reservoir Company, which easement is unaffected and superior to the lien of any Judgment of the appellee, Winston Brothers Company, a corporation.

12. In holding that the lands necessary for irrigation purposes, the legal title to which is held by Teton Cooperative Reservoir Company, are not appurtenant to the lands of the stockholders of the appellant, Brady Irrigation Company, irrigated with waters diverted, impounded and stored by means of the irrigation works under the supervision of Teton Cooperative Reservoir Company.

13. In not denying the motion of the appellee, Winston Brothers Company, a corporation, to dismiss the plaintiff's Complaint and petition for Declaratory Judgment.

14. In the rendition of the final Judgment in this case, filed and entered herein on the 14th day of April, 1939.

The appellant, Brady Irrigation Company, deems the entire record as filed with the clerk of this Court, and designated in the Stipulation as to the record on appeal filed in the office of the District Court herein, which Stipulation is incorporated as a part of said record, necessary for the consideration of the contentions above enumerated.

Dated this 5th day of August, A. D. 1939.

I. W. CHURCH
 ART JARDINE
 J. W. FREEMAN
 J. P. FREEMAN
 ERNEST ABEL

By J. W. FREEMAN

Attorneys for Appellant.

Service of the foregoing Statement and Designation is hereby acknowledged this 5th day of August, 1939.

S. B. CHASE, JR.
 R. H. GLOVER
 JOHN D. STEPHENSON

Attorneys for Respondent,
 Winston Brothers Company, a
 corporation.

[Title of Circuit Court of Appeals and Cause.]

STATEMENT OF POINTS ON WHICH APPELLANTS, JAMES A. ACKROYD, DWIGHT S. BRIGHAM, MORRIS F. LACROIX, EARLE L. CARTER, J. EDWARD STEVENS AND FRANK E. NELSON, INTEND TO RELY ON APPEAL AND DESIGNATION OF PARTS OF RECORD WHICH SAID APPELLANTS THINK NECESSARY FOR THE CONSIDERATION THEREOF.

The Appellants, James A. Ackroyd, Dwight S. Brigham, Morris F. LaCroix, Earle L. Carter, J. Edward Stevens, and Frank E. Nelson, intend to rely, upon the appeal in the above-entitled action, on the contentions that the District Court erred:

1. In granting the motion to dismiss of the Appellee, Winston Brothers Company, a corporation, directed at the bill of intervention of the said Appellants;

2. In rendering and entering the final judgment below of April 14th, 1939, dismissing the said action.

The points of law upon which the said Appellants, James A. Ackroyd, Dwight S. Brigham, Morris F. LaCroix, Earle L. Carter, J. Edward Stevens, and Frank E. Nelson, intend to rely, stated in general terms, are as follows, to-wit:

1. That the Appellant, Brady Irrigation Company, a corporation, and the Appellants, James A. Ackroyd, Dwight S. Brigham, Morris F. LaCroix,

Earle L. Carter, J. Edward Stevens, and Frank E. Nelson, were entitled to a declaratory judgment declaring that the Appellee, Winston Brothers Company, is without right, under the judgment it has obtained against the Teton Co-Operative Reservoir Co., or under any writ or writs of execution issued thereon, to sell, either at Sheriff's sale or otherwise or at all, any of the real estate of the said Teton Co-Operative Reservoir Co., and that the said Appellee, Winston Brothers Company, has no lien under the said judgment upon the said real estate;

2. That the said Teton Co-Operative Reservoir Co. holds its real estate in trust for its stockholders as the cestuis que trust and that, accordingly, such real estate is not subject to levy under execution upon any judgment against the said Teton Co-Operative Reservoir Co.;

3. That, in effect, the real estate of the Teton Co-Operative Reservoir Co., involved in this action, belongs to Bynum Irrigation District, a public corporation of the State of Montana, and that, hence, for reasons of public policy such real estate is exempt from execution;

4. That the judgment lien and execution statutes of Montana do not apply to the real estate of the Teton Co-Operative Reservoir Co. in view of the fact that such real estate is, in fact, public property necessarily used by a public corporation in the discharge of its public duties.

The said Appellants, James A. Ackroyd, Dwight S. Brigham, Morris F. LaCroix, Earle L. Carter, J. Edward Stevens, and Frank E. Nelson, deem the entire record, as certified to this Court and on file herein, to be necessary for the consideration of the contentions and points of law enumerated above.

Therefore, pursuant to Rule 18, Par. 6, of the Rules of this Court, the Appellants, James A. Ackroyd, Dwight S. Brigham, Morris F. LaCroix, Earle L. Carter, J. Edward Stevens, and Frank E. Nelson, designate for printing herein the entire record so certified and filed.

Dated this 9th day of August, A. D. 1939.

STERLING M. WOOD

R. E. COOKE

By STERLING M. WOOD

Attorneys for Appellants, James
A. Ackroyd, Dwight S. Brigham,
Morris F. LaCroix,
Earle L. Carter, J. Edward
Stevens and Frank E. Nelson.

[Endorsed]: Filed Aug. 11, 1939.

